

Before the
Federal Communications Commission
Washington, D.C. 20554

<p>In the Matter of</p> <p>Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States</p> <p>Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations</p> <p>COMMUNICATIONS SATELLITE CORPORATION</p> <p>Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite</p>	<p>IB Docket No. 96-111</p> <p>CC Docket No. 93-23</p> <p>RM-7931</p> <p>File No. ISP-92-007</p>
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REPORT AND ORDER

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By the Commission: Chairman Kennard issuing a statement.

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I. INTRODUCTION AND SUMMARY

A. Introduction

1. Today, we take an historic step by implementing the market opening commitments made by the United States in the World Trade Organization (WTO) Agreement on Basic Telecommunications Services (WTO Basic Telecom Agreement).¹ The WTO Basic Telecom Agreement, which will take effect on January 1, 1998,² is the culmination of the efforts of the United States and 68 other WTO Members to bring competition to global markets for telecommunications services, including satellite services. The WTO Basic Telecom Agreement is centered on the principles of open markets, private investment, and competition. It covers nations that account for 90 percent of worldwide telecommunications services revenues. By opening markets worldwide, the WTO Basic Telecom Agreement will allow new entrants to deploy innovative, cost-effective technologies, and thereby advance the growth of satellite services around the globe.

2. We are optimistic that global implementation of the WTO Basic Telecom Agreement will result in significant worldwide benefits to consumers and providers. At the same time, we recognize that much work needs to be done to ensure that the promise of the WTO Basic Telecom Agreement is fulfilled. With this *Report and Order* and the companion *Foreign Participation in the U.S. Telecommunications Market Report and Order*,³ which we also adopt today, we have implemented the letter and the spirit of the market-opening commitments made by the United States. We expect that foreign entities will begin to enter and compete in the U.S. market soon after January 1, 1998. We also expect that U.S. providers will likewise be able to enter and compete in previously-closed foreign markets.

3. Under the terms of the WTO Basic Telecom Agreement, the United States has committed to allow foreign suppliers to provide a broad range of basic telecommunications

¹ As described below in Section II.B., the results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS (April 30, 1996), 36 I.L.M. 336 (1997) (the "Fourth Protocol to the GATS"). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

² See ¶ 3 of the Fourth Protocol to the GATS.

³ *Foreign Participation in the U.S. Telecommunications Market Report and Order*, FCC 97-398 (rel. November 26, 1997) (*Foreign Participation Order*).

services, including satellite services, in the United States. In return, most of the world's major trading nations have made binding commitments to move from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services. In this *Report and Order*, we implement the U.S. Government's commitments to provide access to the U.S. market for satellite services by establishing a framework for assessing applications by foreign satellite systems to serve the United States.

4. The common sense policies and rules we adopt will produce substantial public interest benefits for U.S. consumers. First, they will facilitate greater competition in the U.S. satellite services market. Enhanced competition in the U.S. market, in turn, will provide users more alternatives in choosing communications providers and services, as well as reduce prices and facilitate technological innovation. In addition to encouraging a more competitive satellite market in the United States, this new environment will spur development of broader, more global satellite systems. These advancements will foster greater global community benefits by providing users increased access to people, places, information, and ideas worldwide.

5. In our companion *Foreign Participation Order*, we take parallel steps to carry out the market opening commitments made by the United States in the WTO Basic Telecom Agreement. That order establishes a framework for facilitating entry into the U.S. market by foreign entities for provision of telecommunications services (other than satellite services). As in our companion order, in this *Report and Order* we adopt for satellite services an approach that encourages foreign entry. Both decisions are guided by the common objective of promoting competition in the U.S. market, and achieving a more competitive global market for all basic telecommunications services.

6. While the United States was negotiating the WTO Basic Telecom Agreement, the Federal Communications Commission (Commission) was exploring measures to increase opportunities for foreign entry in the United States satellite services market. The Commission began this proceeding in May 1996 by issuing a *Notice of Proposed Rulemaking*.⁴ As described more fully below, the *Notice* proposed a uniform framework for permitting foreign-licensed satellite systems to serve the United States. Adopted when only a few of the world's satellite markets were open to competition by U.S. providers, the *Notice* proposed to evaluate the effective competitive opportunities (ECO) in the country in which the foreign satellite was licensed (the ECO-Sat test) prior to granting an application to serve the United States. After the conclusion of the WTO Basic Telecom Agreement, the Commission issued a *Further Notice of Proposed Rulemaking* revising its proposals based on the market-opening changes

⁴ *In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Notice of Proposed Rulemaking, 11 FCC Rcd 18178 (1996) (*Notice* or *NPRM*).

that will result from the Agreement.⁵ Both the *Notice* and the *Further Notice* reflect our continuing goal to foster development of innovative satellite communications services for U.S. consumers through fair and vigorous competition among multiple service providers, including foreign-licensed satellites.

7. Specifically, today we adopt a framework under which we will consider requests for access by non-U.S. licensed satellites⁶ into the United States. As required by Title III of the Communications Act of 1934, as amended (Communications Act), we will examine all requests to determine whether grant of authority is consistent with the public interest, convenience and necessity.⁷ In making this determination, we will consider public interest factors such as the effect on competition in the United States, spectrum availability, eligibility and operating requirements, as well as national security, law enforcement, and trade and foreign policy concerns. We adopt a presumption that entry by WTO Member satellite systems will promote competition in the U.S. satellite services market. Opposing parties may rebut the presumption by showing that granting the application would cause competitive harm in the U.S. satellite services market. Although we find that license conditions will almost always provide sufficient protection against anticompetitive conduct, we recognize the possibility that circumstances might arise in which conditions might not adequately constrain the potential for anticompetitive harm in the U.S. market. In such an exceptional case, where grant would pose a very high risk to competition that cannot be cured by license conditions, the Commission reserves the right to deny an application.

8. We also will apply the presumption in favor of entry to affiliates of intergovernmental satellite organizations (IGO) licensed by WTO Members. For applications from COMSAT to provide U.S. domestic service via INTELSAT or Inmarsat satellites, we will require COMSAT to waive its immunity from suit and demonstrate that the service will enhance competition in the U.S. market. For satellites licensed by non-WTO Members and for all satellites providing Direct-to-Home (DTH), Direct Broadcasting Satellite (DBS), and Digital Audio Radio Services (DARS), we will examine whether U.S. satellites have effective competitive opportunities in the relevant foreign markets to determine whether allowing the foreign-licensed satellite to serve the United States would satisfy the competition component of the public interest analysis.

⁵ Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Further Notice of Proposed Rulemaking, FCC 97-252 (released July 18, 1997) (*Further Notice* or FNPRM).

⁶ Throughout this *Report and Order*, the phrase "non-U.S." satellite system or operator means one that does not hold a commercial space station license from the Commission. By contrast, a "U.S." satellite system or operator means one whose space station is licensed by the Commission.

⁷ 47 U.S.C. § 301, *et. seq.*

9. The new structure we establish today is based on consideration of over 100 comments submitted from parties around the world over the course of more than a year and is grounded in the public interest requirements of the Communications Act and the procompetitive principles of the WTO Basic Telecommunications Agreement. It sets forth criteria for entry into the United States by various types of non-U.S. satellites, delineates the Commission rules that will apply, and describes in detail the procedures for applications to provide service in the United States using a non-U.S. licensed satellite. This framework will largely replace the Commission's current approach of reviewing applications involving foreign-licensed satellites based on the individual circumstances before it. We expect that our new framework will encourage and ease entry by non-U.S. satellites into the U.S. market and that the occasional request we receive today involving a foreign-licensed satellite will become more common. We plan to look carefully at market opening measures enacted by the rest of the world.

B. Executive Summary

10. *Policy Objectives.* The purpose of this *Report and Order* is to establish a new framework to facilitate competitive entry in the U.S. satellite services market by foreign-licensed satellites to implement the WTO Basic Telecom Agreement. Providing opportunities for foreign-licensed satellites to deliver services in this country should bring U.S. consumers the benefits of enhanced competition and afford greater opportunities for U.S. companies to enter previously closed foreign markets, thereby stimulating a more competitive global satellite services market.

11. *WTO Members.* We adopt an open entry standard for applicants seeking to access satellite systems licensed by WTO Members to provide satellite services covered by the U.S. commitments under the WTO Basic Telecom Agreement. An open entry policy will enable U.S. consumers to enjoy the benefits of increased competition in U.S. markets. We presume that entry will enhance competition in light of the commitments of so many WTO Members to lift entry restrictions and adopt competitive safeguards. Where necessary to constrain the potential for anticompetitive harm in the U.S. market for satellite services, we reserve the right to attach conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.

12. *Non-WTO Members.* We continue to be concerned about effective competitive opportunities for U.S. satellite systems (ECO-Sat) in non-WTO Member markets. We find that the market conditions that existed when the Commission proposed to adopt an ECO-Sat test have not changed sufficiently with respect to countries that are not members of the WTO. We therefore find that it will serve the goals of our international satellite policy to apply the ECO-Sat test in the context of applications from non-WTO Member entities and encourage such countries to open their markets to competition.

13. *Services Not Covered by the U.S. Commitments Under the WTO Basic Telecom Agreement.* We find that circumstances that existed when the Commission proposed to adopt

an ECO-Sat test have not changed sufficiently with respect to Direct-to-Home (DTH) services, Direct Broadcast Satellite (DBS) services, and Digital Audio Radio Services (DARS). Commitments made as part of the WTO Basic Telecom Agreement were not sufficient to enable us to adopt a presumption of entry for these services. We will apply the ECO-Sat test to applications to provide these services through all foreign satellite systems, whether or not they are systems of WTO Members.

14. *Intergovernmental Satellite Organizations (IGOs) and IGO Affiliates.* Prior to acting on any application from COMSAT to provide domestic service via INTELSAT or Inmarsat, we will require COMSAT to make an appropriate waiver of its immunity from suit, including suit under the U.S. antitrust laws. We will then look to COMSAT to show that entry into the domestic market would promote competition and would otherwise be in the public interest. We will treat IGO affiliates that are licensed by WTO Members as we would similar systems licensed by WTO Members. In evaluating the competition component of an application involving an IGO affiliate, we will consider any potential anticompetitive or market distorting consequences of a continued relationship or connection between an IGO and its affiliate.

15. *Additional Public Interest Factors and Operating Requirements.* In evaluating requests to serve the United States using a non-U.S. satellite, we also will consider additional public interest factors, including spectrum availability, eligibility requirements such as legal, technical and financial qualifications, operating requirements, and national security, law enforcement, foreign policy and trade policy concerns, as appropriate. In applying these factors, we will treat non-U.S. satellites and U.S. satellites alike. Thus, non-U.S. systems will be required to comply with the same financial, technical and legal qualifications, observe the prohibition against exclusive service arrangements, and comply with other general service rules applicable to U.S. systems.

16. *Access Procedures.* In implementing this framework, we will not require space stations licensed by another country or administration to obtain separate and duplicative U.S. space station licenses. Rather, we will license earth stations located in the United States to operate with these satellites. Further, we will permit operators of existing or planned non-U.S. space stations to participate in U.S. space station processing rounds, where we consider competing applications to operate space stations that will offer a specific satellite service in particular frequency bands. In addition, earth station entities may file an earth station application either in a processing round or separately where the non-U.S. satellite is already in orbit.

II. BACKGROUND

A. *Notice of Proposed Rulemaking*

17. As explained above, in the *Notice*⁸ that commenced this proceeding, the Commission proposed a public interest framework for permitting non-U.S. satellite systems to serve the United States. Specifically, the Commission proposed to evaluate applications involving non-U.S. satellites by determining whether U.S. satellite operators have effective competitive opportunities in the satellite service market of the foreign licensing or coordinating administration. The Commission also proposed to consider whether such opportunities exist on the route markets that the applicant seeks to serve from earth stations in the United States.⁹ In making this evaluation, the Commission proposed to examine both *de jure* and *de facto* constraints on entry in the foreign market by U.S. satellite operators.¹⁰ The *Notice* also proposed alternative regulatory approaches for considering whether to permit access to the U.S. domestic market by INTELSAT and Inmarsat or any IGO affiliate.¹¹

18. The *Notice* also asked whether the ECO-Sat test was adaptable to all satellite services.¹² The Commission recognized that, with certain global communications systems, such as mobile satellite systems, landline facilities may be used in the United States, instead of satellite links. For example, a call originating in an office in the United States to a mobile-satellite service (MSS) handset in Asia could travel to Asia by landline before any satellite communication occurs. In that case, there would not be an earth station application or other vehicle to trigger an ECO-Sat analysis. Consequently, the Commission proposed to analyze effective competitive opportunities in the MSS market by measuring whether some critical mass of foreign markets is open to U.S.-licensed MSS systems before we would permit a non-U.S. MSS system to provide *any* service in the United States.¹³ Finally, the Commission proposed to consider any other public interest concerns relevant to the decision to permit access by non-U.S. systems, including spectrum availability, legal and operating

⁸ *Notice*, 11 FCC Rcd 18178.

⁹ See *Notice* at ¶¶ 22-32.

¹⁰ *Id.* at ¶¶ 37-42.

¹¹ *Id.* at ¶¶ 62-74.

¹² *Id.* at ¶¶ 44-47.

¹³ *Id.* at ¶ 47.

requirements, and, with guidance from the Executive Branch when appropriate, issues of national security, law enforcement, foreign policy, and trade policy.¹⁴

B. The WTO Basic Telecom Agreement

19. The WTO Basic Telecom Agreement was completed after issuance of the *Notice*. It was concluded under the framework established by the General Agreement on Trade in Service (GATS), which is one of the agreements negotiated in conjunction with the creation of the WTO.¹⁵ Under the WTO Basic Telecom Agreement, 69 WTO Members, including the United States, committed to provide each other market access in some or all of their basic telecommunications sectors. Forty-nine WTO Members, including the United States, committed to open their markets to foreign competition in satellite services, either on January 1, 1998, or on a phased-in basis.

20. The GATS is composed of three major components. The first component is the general obligations and disciplines that apply to all WTO Members. The second component is the specific commitments relating to market access, national treatment and other commitments that are identified in individual WTO Member Schedules of Specific Commitments.¹⁶ The final component is exemptions from the general obligations that are contained in Lists of Article II (Most-Favored-Nation (MFN)) Exemptions.

21. Because all WTO Members are party to the GATS, they are obligated to comply with the GATS' general obligations regardless of whether they participated in the WTO basic telecommunications services negotiations or made market access commitments. Under Article II of the GATS, all WTO Members must provide MFN treatment to like services and service suppliers of all other WTO Members. In addition to the MFN obligation, all WTO Members must comply with the transparency obligations of Article III of the GATS, which requires prompt publication of all laws and regulations applicable to the provision of services.

¹⁴ *Id.* at ¶ 48. We received 34 comments and 34 reply comments in response to the *Notice*. A list of commenters on the *Notice*, as well as a description of the abbreviations used in this *Report and Order*, is contained in Appendix A.

¹⁵ The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the Marrakesh Agreement). 33 I.L.M. 1125 (1994). The Marrakesh Agreement includes multilateral agreements on trade in goods, services, intellectual property, and dispute settlement. The General Agreement on Trade in Services (GATS) is Annex 1B of the Marrakesh Agreement. 33 I.L.M. 1167 (1994). There are currently about 130 members of the WTO. A fuller description of the WTO Basic Telecom Agreement is included in Sections II.B. and VII. of the *Foreign Participation Order*.

¹⁶ The Schedules of Specific Commitments form an integral part of the GATS pursuant to Article XX of the GATS. The Schedules containing commitments in the basic telecommunications sector are available on the WTO web page at www.wto.org.

22. In the WTO Basic Telecom Agreement, many WTO Members, including the United States, undertook specific commitments with respect to market access and national treatment. GATS Article XVI (Market Access) requires WTO Members to refrain from imposing certain types of quantitative restrictions, economic needs test, or local incorporation requirements, in those sectors where the WTO Member has undertaken specific commitments.¹⁷ This means that a WTO Member may not maintain limits, such as a cap on the number of service suppliers or the corporate form in which a service can be provided, unless the WTO Member has specifically listed such limitations in its Schedule. Article XVII (National Treatment)¹⁸ is a nondiscrimination rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and service suppliers.¹⁹ Treatment of domestic and foreign service suppliers need not be identical to accord MFN or national treatment. Rather, the critical aspect of an MFN or national treatment analysis is whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers.²⁰ Thus, even identical treatment can be inconsistent with MFN or national treatment obligations if it puts the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier.

23. Those WTO Members that undertook market access commitments in basic telecommunications services also become subject to the requirements relating to domestic regulation of those services contained in Article VI (Domestic Regulation). Pursuant to Article VI(1), in sectors where specific commitments are undertaken, domestic regulation must be administered in a reasonable, objective, and impartial manner. Article VI(4) states further that a WTO Member could be in contravention of its commitments if it applies measures that are not based on objective and transparent criteria, are more burdensome than necessary, or that restrict the supply of the service. A WTO Member arguing, however, that

¹⁷ Article XVI(1) requires each Member to "accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." A quantitative restriction is a cap on the number of permitted suppliers; an economic needs test is a limitation on the number of service suppliers based on an assessment of whether the market will be able to absorb new service suppliers without harm to existing service suppliers.

¹⁸ Art. XVII states that "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."

¹⁹ See Reply Comments of the U.S. Trade Representative (USTR) filed in the *Foreign Participation Order* rulemaking (USTR *Foreign Participation* Reply Comments). We grant USTR's request to incorporate these comments in this proceeding. USTR FNPRM Reply Comments at 6.

²⁰ See USTR *Foreign Participation* Reply Comments at 11, n.16.

a measure contravenes Article VI(4) also must show that application of the measures could not have been reasonably expected at the time specific commitments were made.²¹

24. Finally, the United States and 54 other countries undertook additional specific commitments regarding procompetitive regulatory principles contained in the "Reference Paper."²² The Reference Paper contains principles relating to competition safeguards, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce frequencies.²³

25. The United States committed to provide market access to all basic telecommunications services and national treatment to service suppliers of WTO Members. The United States maintained limits on direct access to INTELSAT and Inmarsat for COMSAT for the provision of basic telecommunications services. The United States also maintained a limit of 20 percent on direct foreign ownership of common carrier radio licenses,²⁴ but agreed to permit 100 percent indirect foreign ownership. In addition, the United States made no market access or national treatment commitments for DTH, DBS, and DARS, and took an exception from MFN for those services.²⁵

26. The GATS also allows for exceptions to a WTO Member's obligations. Where these exceptions apply, a WTO Member may act inconsistently with its MFN, national treatment or market access commitments or any other GATS obligation. Article XIV (General Exceptions) establishes a limited set of general exceptions, for measures necessary to protect public morals and order, protect human and animal health or secure compliance with nondiscriminatory laws and regulations.²⁶ Article XIV *bis* (Security Exceptions) permits a

²¹ Article VI(5)(a) states that a Member "shall not apply licensing and qualification requirements and technical standards that nullify or impair [its] specific commitments in a manner which . . . could not reasonably have been expected of that Member at the time the specific commitments were made." See also USTR *Foreign Participation* Comments at 9.

²² In addition, ten WTO Members committed to honoring many of the principles in the Reference Paper. The Reference Paper was distributed by the WTO Secretariat but never formally issued as a WTO document. The text is published in 36 I.L.M. 367 (1997).

²³ Many of these principles already are applied in the United States under the Communications Act, the Telecommunications Act of 1996, and the Administrative Procedure Act.

²⁴ The limitation is based on the statutory prohibition in Section 310(b)(3) of the Communications Act, which prohibits direct foreign ownership beyond 20 percent. See 47 U.S.C. § 310(b)(3).

²⁵ These services are referred to in this order as "non-covered services."

²⁶ Article XIV states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement... ."

WTO Member to deviate from its GATS obligations in order to protect national security interests or to carry out any obligations under the U.N. Charter to maintain international peace and security.²⁷

27. The commitments of the WTO Basic Telecom Agreement can be enforced through WTO dispute settlement.²⁸ If a WTO Member fails to give a U.S. carrier market access consistent with that WTO Member's commitments or fails to implement the regulatory principles it adopted, the United States may enforce those commitments through the dispute settlement process at the WTO. The remedies available if the United States prevails include first an obligation by the losing WTO Member to fulfill its market access commitments or implement the necessary regulatory principles. If the losing WTO Member fails to do so, it is required to compensate the United States in trade terms or else the United States may take compensatory trade action. The United States would be required initially to withdraw concessions in the services sector, but if sufficient compensatory trade action is not available in the services sector, then the United States would be authorized to take compensatory action in the goods sector. Thus, if a WTO Member that has committed to allow market access to provide satellite services but denies a license to a U.S. provider on the grounds of its nationality, the United States would have the right to take a dispute against that WTO Member in the WTO. While companies from the defendant WTO Member might not be interested in entering the U.S. telecommunications market, its industry likely would have substantial volumes of trade with the United States in a variety of other goods and services sectors. Thus, if the United States prevails in a dispute, the losing WTO Member would most likely agree to fulfill its market access or regulatory principles commitments rather than accept compensatory trade action in other services or goods sectors.

C. *Further Notice of Proposed Rulemaking*

28. After conclusion of the WTO Basic Telecom Agreement, we issued a *Further Notice of Proposed Rulemaking* requesting comment on how best to open U.S. markets consistent with our commitments under the new agreement and our goal of promoting a competitive satellite market in the United States.²⁹ We sought comment on whether, and to what extent, the proposals in the *Notice* should be changed both with respect to countries and

²⁷ Article XIV *bis* states that "[n]othing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests . . . or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

²⁸ GATS Article XXII provides that any WTO Member may initiate dispute settlement if it believes that another Member has failed to carry out its obligations or specific commitments.

²⁹ See *supra* n.4. We received 27 comments and 17 reply comments in response to the *Further Notice*. A list of commenters, as well as a description of the abbreviations used in this *Report and Order*, is attached as Appendix B.

services covered by the WTO Basic Telecom Agreement and those that are not. We proposed to establish a presumption that as a result of the agreement and the obligations of the GATS, competition will be promoted, and therefore, no ECO-Sat analysis is required, in evaluating whether to permit satellites licensed by WTO Members to provide covered services within the United States and between the United States and other WTO Members.³⁰ We also proposed to allow opposing parties to show that grant of a license would pose a very high risk to competition in the U.S. satellite market that could not be cured by license conditions. We proposed to retain the ECO-Sat test for satellites licensed by non-WTO countries³¹ and noncovered services (DTH, DBS, and DARS).³² With respect to IGOs and their affiliates and consideration of other public interest factors, the *Further Notice* repeated proposals contained in the *Notice*.

III. DISCUSSION

A. General Framework

29. As proposed in the *Notice* and *Further Notice*, in order to be approved, each request for access to the United States by a non-U.S. satellite system must be in the public interest. A public interest analysis is required by the Communications Act, is a valid exercise of U.S. domestic regulatory authority, and, as discussed more fully below, is consistent with U.S. obligations under the GATS.³³ Where a non-U.S. satellite licensed by a WTO Member and a WTO-covered satellite service are involved, we will presume that foreign entry would promote competition in the United States. In cases involving satellites licensed by non-WTO countries or noncovered services, we will apply an ECO-Sat test. For every request, we also will consider spectrum availability, eligibility requirements and operating requirements, and national security, law enforcement, foreign policy, and trade issues.

³⁰ *Further Notice* at ¶¶ 16-19.

³¹ *Id.* at ¶¶ 23-24.

³² *Id.* at ¶¶ 20-22.

³³ *See infra* Section III.E.

B. Public Interest Analysis**1. Competition Considerations****a. WTO-Member Satellites Providing WTO-Covered Services****(1) Presumption in Favor of Entry****Background**

30. The United States satellite commitments under the WTO Basic Telecom Agreement cover fixed satellite services (FSS) and mobile satellite services (MSS) (WTO-covered services). In the *Further Notice*, the Commission proposed that, in evaluating requests to access non-U.S. satellites licensed by WTO Members to provide WTO-covered services within the United States or between the United States and other WTO Members, we would apply a presumption in favor of entry.³⁴ The Commission based this proposal on its view that the general obligations of all WTO Members under the GATS, as well as the satellite market access commitments of 49 countries under the WTO Basic Telecom Agreement, would enhance competition in the U.S. satellite services market.³⁵ Specifically, the Commission proposed not to apply the ECO-Sat test, which had been proposed prior to the WTO Basic Telecom Agreement, to satellites licensed by WTO Members providing covered services.³⁶

31. The Commission also proposed to forego the ECO-Sat test for all WTO Members, including those that did not make specific commitments for satellite services. The Commission proposed this because these WTO Members are bound to extend MFN treatment to services or service suppliers of other WTO Members, unless a specific limitation has been taken, and are subject to the dispute resolution process contained in the GATS.³⁷

32. In addition, in the *Further Notice*, the Commission proposed to permit parties opposing an application to serve the United States from a non-U.S. satellite system licensed

³⁴ *Further Notice* at ¶¶ 2, 13, 18.

³⁵ *Id.* at ¶¶ 2, 17.

³⁶ *Id.* at ¶¶ 2, 13. As discussed above, *see supra* Section II.A., the Commission initially proposed the ECO-Sat test in the *Notice*, 11 FCC Rcd 18178, 18187-18194. Because the Commission subsequently proposed to forego the ECO-Sat test for satellites licensed by WTO Members, and rather proposed to apply a presumption in favor of entry, which the Commission now adopts, the comments on the *Notice* regarding the ECO-Sat test are not applicable to this section of the *Report and Order*. Comments on the ECO-Sat test are applicable, however, to our discussion of non-WTO countries and services not covered by U.S. commitments in the WTO Basic Telecom Agreement. *See infra* Section III.B.1.b. and c.

³⁷ *Id.* at ¶ 17.

by a WTO Member to demonstrate that grant would pose a "very high risk to competition in the United States satellite market that could not be addressed by placing a condition on the authorization," in order to rebut the presumption of competitive entry.³⁸ The Commission stated that if the opposing party meets this burden, it may deny access to the United States,³⁹ and noted that, independent of any comments, it could make its own such determination.⁴⁰

33. The Commission also sought comment on the types of license conditions it could impose to minimize the likelihood of anticompetitive behavior.⁴¹ The Commission noted, for example, that for systems to which access already has been authorized, it could condition authorization of additional earth stations on the absence of factors that we have identified as being anticompetitive in that particular case. Alternatively, the Commission could impose stricter reporting requirements in authorizing systems for which there is a greater likelihood of competitive harm. Finally, the Commission requested that commenters address specific benefits or disadvantages of these or any other proposals for minimizing anticompetitive behavior in accessing non-U.S. satellite systems, focusing particularly on the principles delineated in the Reference Paper.⁴²

Positions of the Parties

34. The parties overwhelmingly support our proposal to forego the ECO-Sat test for satellites licensed by WTO Members for covered services and evaluate requests based on a presumption in favor of entry.⁴³ Numerous commenters, including Deutsche Telekom, GE Americom, COMSAT, AirTouch, the Networks, ICO (an affiliate of Inmarsat), and Motorola support the Commission's view that the WTO Basic Telecom Agreement will enhance

³⁸ *Id.* at ¶¶ 13, 18, 19.

³⁹ *Id.*

⁴⁰ *Id.* at ¶ 13.

⁴¹ *Id.* at ¶ 19.

⁴² *Id.*

⁴³ AirTouch FNPRM Comments at 2; Columbia FNPRM Comments at 4; COMSAT FNPRM Comments at 5-9; COMSAT FNPRM Reply Comments at 2-5; Deutsche Telekom FNPRM Reply Comments at 2; European Commission FNPRM Reply Comments at 1; GE Americom FNPRM Comments at 3-4; GlobeCast FNPRM Comments at 2-3; Government of Japan FNPRM Comments at 1; Hughes FNPRM Comments at 6-10; Hughes FNPRM Reply Comments at 3-4; ICO FNPRM Comments at 4-7; ICO FNPRM Reply Comments at 1-5; Lockheed Martin FNPRM Comments at 2-3; Loral FNPRM Comments at 3; Motorola FNPRM Comments at 3-4; Orion FNPRM Comments at 3-8; PanAmSat FNPRM Comments at 2; PanAmSat FNPRM Reply Comments at 1; Qualcomm FNPRM Comments at 2-3; Skybridge FNPRM Comments at 3; Space Communications FNPRM Reply Comments at 4; Teledesic FNPRM Comments at 3-4; Telesat FNPRM Comments at 4-5; TMI FNPRM Comments at 2; USTR FNPRM Reply Comments at 5.

competition in the satellite services market.⁴⁴ Deutsche Telekom, ICO, and Hughes argue that application of an ECO-Sat test to WTO Members would violate the national treatment and MFN obligations of the WTO Basic Telecom Agreement.⁴⁵

35. Qualcomm asserts that we should apply the presumption in favor of entry to all WTO Members, including those that did not make market access commitments for satellite services. It contends that the general competitive obligations of the GATS are sufficient to presume that service in the United States by such WTO Members will foster competition.⁴⁶ Hughes asserts that in negotiating the WTO Basic Telecom Agreement, the Executive Branch was aware that the commitments of WTO Members would vary, but concluded that the Agreement would create significant overall benefits for U.S. satellite service providers and that the U.S. policy should be to promote competition from foreign-licensed satellites.⁴⁷

36. Some commenters argue that applicants should bear the burden of demonstrating that their entry will pose no risk to competition.⁴⁸ AMSC, for example, asserts that the proposed presumption for satellite systems from WTO Members is not required by the WTO Basic Telecom Agreement and is contrary to the burden the Commission normally establishes on applicants to demonstrate compliance with the Communications Act. According to AMSC, there should be a "heavy burden on the proponent to establish grounds for such a reversal of Commission policy."⁴⁹ Loral argues in fact that this standard effectively treats non-U.S. satellites more favorably than U.S. applicants.⁵⁰

37. Most commenters support the Commission's proposal to allow opposing parties to rebut the presumption that entry by a non-U.S. satellite would promote competition only by

⁴⁴ Deutsche Telekom FNPRM Reply Comments at 3. GE Americom FNPRM Comments at 2. GE Americom also states that "achievement of the agreement was facilitated by the Commission's emphasis on creating competitive market structures in the United States and on encouraging the adoption of similar policies in other countries." *Id.* Accord Hughes FNPRM Reply Comments at 2. COMSAT FNPRM Comments at 3; AirTouch FNPRM Comments at 1-2; Networks FNPRM Comments at 5; ICO FNPRM Reply Comments at 3; ICO FNPRM Comments at 2-3; Motorola FNPRM Comments at 2.

⁴⁵ Hughes FNPRM Comments at 7-8; Deutsche Telekom FNPRM Reply Comments at 3. According to Hughes, for example, examining the openness of various markets to U.S.-licensed satellites could result in differential treatment among WTO Members, thereby violating the MFN obligation. Hughes FNPRM Comments at 8.

⁴⁶ Qualcomm FNPRM Comments at 3.

⁴⁷ Hughes FNPRM Comments at 8.

⁴⁸ Loral FNPRM Comments at 22-23 and n.42 (citing 47 U.S.C. §§ 303, 308(b), 309(a)).

⁴⁹ AMSC FNPRM Reply Comments at 12.

⁵⁰ Loral FNPRM Comments at 23.

demonstrating that service to the United States by a satellite licensed by a WTO Member would create a very high risk of competitive harm that could not be cured by license conditions.⁵¹ Orion anticipates that most applications for WTO-covered services between the United States and a WTO Member destination will present "little, if any, such risk."⁵² PanAmSat argues that the burden must "necessarily be high," and, if met, the Commission "must," rather than "may," deny the request.⁵³ AT&T asserts that the "very high risk to competition" standard should instead be "*substantial risk*" to competition.⁵⁴ COMSAT contends that denying or delaying access to the U.S. market, or imposing unreasonable or unnecessary safeguards, not only would violate national treatment, but likely would lead other countries to impose similar obstacles for U.S.-licensed systems, thus jeopardizing the benefits of the WTO Basic Telecom Agreement.⁵⁵ Space Communications advocates that we require that risks to competition be "highly likely to have a broad-based impact in the relevant market."⁵⁶ It cites, for example: market concentration, discrimination, below average variable cost pricing, exclusionary effects of exclusive arrangements and monopoly supply of service.⁵⁷ ICO recommends denial of applications involving non-U.S. satellites only "where the applicant has market power and will use that power to raise prices and limit output in the U.S. satellite market."⁵⁸

⁵¹ COMSAT FNPRM Comments at 7; COMSAT FNPRM Reply Comments at 2; GE Americom FNPRM Comments at 3; GE Americom FNPRM Reply Comments at 2-3; Hughes FNPRM Reply Comments at 4; Lockheed Martin FNPRM Comments at 4; Orion FNPRM Comments at 4-5; Qualcomm FNPRM Comments at 3-4; Skybridge FNPRM Comments at 4 n.4; Space Communications FNPRM Reply Comments at 3.

⁵² Orion FNPRM Comments at 5.

⁵³ PanAmSat FNPRM Comments at 3.

⁵⁴ AT&T FNPRM Comments at 13.

⁵⁵ COMSAT FNPRM Comments at 7; COMSAT FNPRM Reply Comments at 5-7.

⁵⁶ Space Communications FNPRM Reply Comments at 5.

⁵⁷ In addition, Space Communications asserts that opponents should be required to provide specific evidence of such risks, based on the six principles set forth in the Reference Paper or the WTO commitments of the home market, as well as explain why conditions on the authorization would be inadequate to protect competition. *Id.* at 6. According to Space Communications, practices such as discount pricing that do not meet the legal standard required by statutes for a finding of predatory pricing -- practices that could be considered aggressively competitive, but not illegal restraints under U.S. antitrust law -- should *not* be treated as a "very high risk" to competition. *Id.* at 5.

⁵⁸ ICO FNPRM Comments at 8-9. ICO supports the proposal to the extent that it confirms the Commission's continuing, concurrent jurisdiction to enforce U.S. antitrust laws. *Id.* at 7. It also asserts that U.S. antitrust laws assume that an increase in the number of competitors will increase consumer welfare, and any abusive conduct by a new entrant would be addressed through post-entry enforcement. ICO claims further that antitrust laws prohibit entry only where entry itself will reduce competition, limit output, and raise prices. *Id.* at 7-9 & n.12. In addition, ICO claims that trade disputes should not bar entry. *Id.* at 9.

38. USTR states that the GATS does not prohibit the regulatory standard we adopt.⁵⁹ Other parties, however, challenge the proposal based on alleged inconsistencies with the GATS and some offer recommendations for implementing the standard consistent with the GATS.⁶⁰ A few commenters raise MFN and national treatment objections.⁶¹ The European Commission, the Government of Japan, and Japan Satellite Systems argue that the proposed competitive harm standard is too vague.⁶² The European Commission claims that if adopted, the proposal would erect additional burdens for foreign companies wishing to enter the U.S. satellite market. The Government of Japan requests that we make publicly available the detailed criteria that we would employ and apply our rules consistent with the GATS.⁶³ France Telecom contends that Commission action under the guise of competition could contradict market access commitments.⁶⁴ Deutsche Telekom claims that the proposed presumption is vague and incompatible with the GATS because the U.S. Schedule of Specific Commitments does not contain a rebuttable presumption for market access where there is a "very high risk to competition."⁶⁵ GlobeCast contends that the proposal creates a "loop-hole for the Commission to abrogate the WTO Basic Telecom Agreement at its sole discretion,

⁵⁹ USTR FNPRM Reply Comments at 5.

⁶⁰ See, e.g., Deutsche Telekom FNPRM Reply Comments at 6-7; France Telecom FNPRM Reply Comments at 5; GlobeCast FNPRM Comments at 3; Government of Japan FNPRM Comments at 2.

⁶¹ See Deutsche Telekom FNPRM Reply Comments at 6-7; COMSAT FNPRM Comments at 7. Deutsche Telekom states that under MFN obligations the Commission may not grant market access to a satellite system from one WTO Member and deny it to a "like" system from another Member, and that the competitive situation in a satellite system's home or route markets is not a factor that makes satellite systems alike (or not) under the GATS. In addition, Deutsche Telekom argues that because U.S. systems would not be subject to the "very high risk to competition" rule, non-U.S. applicants would be treated less favorably than U.S. operators in violation of the GATS. Deutsche Telekom FNPRM Reply Comments at 6-7.

⁶² European Commission FNPRM Reply Comments at 2; Government of Japan FNPRM Comments at 2; Japan Sat FNPRM Comments at 2. See also Deutsche Telekom FNPRM Reply Comments at 5; France Telecom FNPRM Reply Comments at 5; Space Communications FNPRM Comments at 5 (criticizing vagueness of proposal). For example, according to Deutsche Telekom, given the similarity between the burden standard and the ECO-Sat test, it is possible that the Commission will consider elements of the ECO-Sat while assessing applications by WTO Members. Deutsche Telekom FNPRM Reply Comments at 5. Deutsche Telekom also argues that the uncertainty of the "very high risk to competition" rule would have a "significant impact" on a satellite operator's financing and planning, which would be problematic because of the high financial investments required for satellites. *Id.*

⁶³ Government of Japan FNPRM Comments at 2.

⁶⁴ France Telecom FNPRM Reply Comments at 4-5.

⁶⁵ Deutsche Telekom FNPRM Reply Comments at 7. See also European Commission FNPRM Reply Comments at 2.

whenever it decides that a non-U.S. licensed satellite is a competitive threat.”⁶⁶ ICO argues that the GATS requires WTO Members to use the WTO dispute settlement mechanism, rather than exclusion from domestic markets, as a means of resolving claims that the markets of other WTO Members are not sufficiently open to competition. In addition, it states that the Commission may not take the level of a Member’s commitments into account in the absence of a specific reservation to that effect.⁶⁷

Discussion

39. We adopt our proposal to apply a presumption in favor of entry in considering applications to access non-U.S. satellites licensed by WTO Members to provide services covered by the U.S. commitments under the WTO Basic Telecom Agreement. Specifically, we will presume that satellite systems licensed by WTO Members providing WTO-covered services satisfy the competition component of the public interest analysis. As discussed in the *Further Notice*,⁶⁸ and supported by the parties to this proceeding,⁶⁹ market access commitments made by WTO Members under the WTO Basic Telecom Agreement and the procompetitive obligations of the GATS and the Reference Paper, will help ensure the presence and advancement of competition in the satellite services market and yield the benefits of a competitive marketplace to consumers in the United States and other countries. These benefits include greater availability of satellite services from a larger number of providers, more efficient and innovative services, lower prices, higher quality, and, overall, more choices for users and consumers in the selection of satellite services.⁷⁰ Thus, these benefits will further the Commission’s goal of promoting a competitive satellite services market in the United States.⁷¹

40. We find that adopting the Commission’s proposal to replace the ECO-Sat test with a presumption in favor of entry will best balance the concerns articulated by the parties. The changes resulting from implementation of the commitments of WTO Members, along with new, more global satellite system designs, will open foreign markets and increase competition in the worldwide satellite services market. We therefore will not conduct an ECO-Sat test with respect to non-U.S. satellite systems licensed by WTO Members and, instead, will presume that entry will promote competition. This approach will have

⁶⁶ GlobeCast FNPRM Comments at 3.

⁶⁷ ICO Reply Comments at 5, 7.

⁶⁸ See *supra* ¶ 27; see also *Further Notice* at ¶¶ 13-19.

⁶⁹ See *supra* ¶ 36.

⁷⁰ *Further Notice* at ¶ 16.

⁷¹ *Id.* at ¶ 13.

significant public interest benefits. First, it will facilitate entry by the 130 Members of the WTO, including our major trading partners. Second, it will avoid detailed, fact-intensive ECO-Sat analyses by the applicant and the Commission, thereby expediting the entry process. The opportunity to serve the U.S. market under a presumption in favor of entry, coupled with the procedural ease of the framework we adopt today, will advance entry of new competitors and services into the U.S. satellite services market. By enhancing competition, this approach will provide U.S. consumers with additional choices among providers, reduce prices, and increase the quality and variety of services.

41. We also adopt the proposal to allow parties to rebut the presumption of entry by showing that grant of an application by a non-U.S. satellite system licensed by a WTO Member would cause competitive harm in the United States satellite market. In most cases, our rule prohibiting exclusive arrangements will adequately address competition concerns.⁷² It is possible, however, that this prohibition would be insufficient to prevent anticompetitive harm in the United States. Where necessary to constrain the potential for anticompetitive harm in the U.S. market for satellite services, we reserve the right to attach additional conditions to a grant of authority, or, in the exceptional case in which grant would pose a very high risk to competition, to deny an application. Prospective circumstances that could give rise to competition concerns include some of those identified by the parties: market concentration, discrimination, below average variable cost pricing, monopoly supply of service, as Space Communications states, or where the applicant has market power and could use that power to raise prices and limit output in the U.S. satellite market, as ICO suggests. Based on the development of the satellite market thus far, it has not been necessary to devise or impose competitive safeguards other than the rule against exclusive arrangements. Should such a need arise, the Commission would devise and apply appropriate conditions.

42. We also are concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's rules and, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of an earth station applicant or space station operator that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct. This approach is consistent with our

⁷² This rule prohibits licensees from entering arrangements with foreign countries to be the exclusive provider of a particular satellite service in that country. *See, e.g.*, 47 CFR § 25.143(j). As described below, all satellite systems serving the United States, including any non-U.S. licensed system, will be prohibited from serving from the United States on a route involving a country with which it has an exclusive arrangement. *See infra* Section III.B.4.a.

treatment of U.S. applicants.⁷³ We find that such conduct demonstrates that an entity is likely to evade our rules and thus may pose a very high risk to competition.

43. We expect that, given the procompetitive changes in the global satellite services market resulting from the WTO Basic Telecom Agreement, and our ability to impose license conditions, it would be necessary to deny an application involving a non-U.S. satellite licensed by a WTO Member on competition grounds only in exceptional circumstances. This approach is consistent with our statutory requirement to grant licenses that serve the public interest, as well as with our obligations under the WTO Basic Telecom Agreement.

44. As proposed, we will apply the rebuttable presumption paradigm to a satellite system licensed by any WTO Member, including Members that did not make specific market access commitments for satellite services. We do so for three reasons. First, we find that the general obligations of the GATS provide some protection against discriminatory conduct. As described above, all WTO Members are governed by the GATS and must comply with the GATS obligations of MFN and transparency. Consequently, a WTO Member that did not make a market access commitment for satellite services must nonetheless afford no less favorable treatment to a U.S. satellite system than it does to a system licensed in any other country if the WTO Member decides to open its market. In addition, all WTO Members must make public all their measures relating to services. Second, the increased competitive environment for global satellite and telecommunications services resulting from the WTO Basic Telecom Agreement, coupled with the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market. Third, we find that to exclude WTO Members that did not make market access commitments, or distinguish among those based on the quality of their WTO commitment or the extent of the implementation of their commitment, could be interpreted by other WTO Members as discriminating among "like" service suppliers, and could therefore raise an MFN issue. Thus, adopting such a policy could negatively affect relations with our trading partners or discourage open entry policies in countries that also are implementing the WTO Basic Telecom Agreement. The success of the WTO Basic Telecom Agreement depends on prompt, effective implementation of U.S. commitments, as well as those of our trading partners.

45. We disagree with AT&T that the test should be "substantial risk," rather than "very high risk" to competition.⁷⁴ AT&T's standard would undercut the presumption in favor of entry by making it easier to oppose entry. As explained above, the commitments and obligations of countries bound by the GATS and the WTO Basic Telecom Agreement will

⁷³ See *Policy Regarding Character Qualification in Broadcasting Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252 (1990); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n. 14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

⁷⁴ AT&T FNPRM Comments at 13.

generally enhance competition in the United States satellite services market. If adopted, AT&T's suggestion would undermine the commitments made under the WTO Basic Telecom Agreement and the good faith efforts of the WTO Members to implement their commitments. As noted, we expect that only in exceptional cases will we deny applications based on competition grounds.

46. We find unpersuasive the European Commission's position that the Commission may not review or deny applications in order to protect competition in the U.S. market. The GATS does not specify a single mechanism for addressing potential anticompetitive practices in the telecom services sector. The United States has traditionally relied on regulatory enforcement and antitrust actions, and remains free to do so. Analyzing competitive impact is an integral part of the Commission's public interest analysis. The Communications Act charges the Commission with "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." ⁷⁵ In carrying out that charge for over 60 years, the Commission has sought to promote competition in the U.S. market. ⁷⁶ Indeed, we have consistently considered competition issues when authorizing U.S. satellite companies to serve the United States. ⁷⁷ When the United States entered into the WTO Basic Telecom Agreement, it did so with the understanding that its obligations would be carried out consistent with U.S. law. ⁷⁸

47. We also do not agree with those parties that argue that the standard under which we could deny an application involving a non-U.S. WTO-licensed satellite is vague, erects additional barriers for foreign entities, or violates our national treatment obligations. First, we have provided guidance in the discussion above regarding application of the standard. Second, we expect denial of such applications for competitive reasons to occur only

⁷⁵ 47 U.S.C. § 151.

⁷⁶ See, e.g., *Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1 (1980); Second Report & Order, 91 FCC 2d 59 (1982); *recon.* 93 FCC 2d 54 (1983); Third Report & Order, 48 Fed. Reg. 46,791 (1983); Fourth Report & Order, 95 FCC 2d 554 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S.Ct. 3020 (1993); Fifth Report & Order, 98 FCC 2d 1191 (1984); Sixth Report & Order, 99 FCC 2d 1020 (1985), *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

⁷⁷ See, e.g., *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995). See also *Hughes Communications, Inc. and Affiliated Companies and Anselmo Voting Trust/PanAmSat Licensee Corporation and Affiliated Companies*, 12 FCC Rcd 7534 (1996).

⁷⁸ The final offer in the WTO basic telecom negotiations included a cover note which stated that "foreign investors will receive national treatment in accordance with U.S. law." Communications from the United States, "Conditional Offer" (Feb. 12, 1997).

in exceptional circumstances. Third, because we also consider competition factors in evaluating entry by U.S. companies, this approach does not treat U.S.-licensed satellite systems more favorably than foreign systems. Similarly, the standard of entry does not discriminate impermissibly among foreign providers in a manner inconsistent with our MFN obligations, as Deutsche Telekom argues. Whether a measure accords less favorable treatment within the meaning of GATS Article II (MFN) must be decided on a case-by-case basis by considering whether the services or service suppliers are like, and then analyzing the structure and application of the measures.⁷⁹ The analysis focuses not on whether the treatment of like foreign or like domestic suppliers is identical, but rather whether the treatment modifies the conditions of competition in favor of foreign service suppliers of a particular origin or domestic service suppliers. In this case, we are not discriminating among like service suppliers. Rather, we are treating all carriers that have the ability to distort competition similarly, while treating carriers that do not have that ability similarly.

48. In addition, we are not persuaded by Deutsche Telekom's and ICO's argument that we may not consider competition because we have not scheduled such consideration in the U.S. Schedule of Specific Commitments. We note USTR's comment that the negotiating history of the GATS shows that, rather than prohibiting all domestic regulation of basic telecommunications services, Article XVI only prohibits WTO Members from maintaining or adopting the types of quantitative or economic-needs based limitations and measures listed in Article XVI (unless such limitations are included in a WTO Member's Schedule of Specific Commitments).⁸⁰ The standard of review we adopt is not the type of limitation prohibited by Article XVI. Therefore, there is no need for the United States to have included the competition analysis as a limitation on its market access commitments in its Schedule of Specific Commitments.⁸¹

49. We do not accept the notion that we should depend on other countries' implementation of their commitments and the WTO dispute mechanism in lieu of applying competition factors in our regulatory process. There is nothing in the GATS that requires us to refrain from regulating because other WTO Members have an obligation to regulate. Access to WTO dispute settlement does not eliminate the need for and the appropriateness of our regulation of telecommunications services in order to safeguard competitive opportunities.⁸² WTO dispute settlement is an effective remedy, but one that takes some time to obtain. In addition, it is not a remedy that the Commission can seek directly, but depends on Executive Branch action. We have a separate statutory obligation to regulate and enforce

⁷⁹ See, e.g., USTR Foreign Participation Reply Comments at 10-11.

⁸⁰ USTR Foreign Participation Comments at 7, n. 13, citing GATS Secretariat, "Initial Commitments in Trade in Services: Explanatory Note," MTN.GNS/W/164 (Sept. 3, 1994).

⁸¹ *Id.* at 8.

⁸² *Id.* at 9.

our rules that cannot be stayed while the Executive Branch seeks relief in an international tribunal.

(2) Determining a Satellite's WTO Status

Background

50. In the *Notice*, the Commission proposed to evaluate whether U.S. satellite operators have effective competitive opportunities in the market of the administration licensing or coordinating the non-U.S. satellite ("home market") before allowing that satellite access to the U.S. market. As discussed above, the Commission, in the *Further Notice*, proposed to apply a presumption of entry with respect to satellites licensed by WTO Members. This raises the possibility that satellite operators from non-WTO countries might seek to obtain a satellite license from a WTO Member -- an incentive we do not wish to create.

Positions of the Parties

51. Lockheed Martin advocates that the test to determine whether a satellite system qualifies for WTO status should be an applicant's "home market."⁸³ According to Lockheed Martin, an applicant's "home market" should be its principal place of business because that is where the operator is likely to have the most direct economic ties and to participate in the domestic process.⁸⁴ Orion recommends that we consider the home markets of each of the major investors in the foreign-licensed system.⁸⁵

52. Columbia argues that the presumption in favor of entry for satellites licensed by WTO Members should not apply where the satellite is U.S.-owned.⁸⁶ Columbia's concern is that U.S. companies may acquire licenses in WTO Members to avoid the U.S. regulatory process.⁸⁷ To prevent this possibility, Columbia recommends that we require U.S. companies seeking to offer new service in the U.S. market (excluding legitimate joint ventures with existing operators) to obtain a U.S. license to initiate service, regardless of whether a non-

⁸³ Lockheed Martin FNPRM Comments at 3.

⁸⁴ *Id.*

⁸⁵ Orion NPRM Comments at 8. Orion continues to believe that a home market analysis is appropriate. Orion FNPRM Comments at 6.

⁸⁶ Columbia FNPRM Comments at 6-7.

⁸⁷ *Id.* at 6-7 (submitting that the Commission "should not countenance, on the basis of sound telecommunications and trade policies, U.S.-based companies by-passing U.S. regulatory processes in favor of buying access to the orbit from lawless island states, and then obtaining access to the U.S. market by virtue of our commitments as a WTO member country").

U.S. licensee would be permitted into the market based on such a license. It claims that this approach would not disadvantage non-U.S. companies vis-a-vis domestic operators, and thus, would not violate the spirit of the WTO Basic Telecom Agreement.⁸⁸ GE Americom disagrees. It argues that the parity that it and others have advocated in this proceeding adequately assures that foreign-licensed carriers, whether U.S. entities or not, will be treated no more favorably than U.S. entities seeking U.S. licenses to provide carriage in the United States.⁸⁹

Discussion

53. We adopt the proposal to determine the WTO status of a space station based on the country or administration that grants the license or is responsible for coordinating the system internationally. We find that this approach is the most relevant and practical way of determining WTO status for purposes of applying the presumption in favor of entry. As explained in the *Notice*, it is almost always true that the nationality of the satellite owner is the same as that of the licensing country or administration of the system and that the primary service supplier's principal place of business will be located where the satellite is licensed or coordinated.⁹⁰ We recognize that a satellite system licensed by a WTO Member may have majority investment from a non-WTO country, but do not expect this situation to be common enough to justify a departure from the predictable and administratively simple rule we proposed. In addition, we recognize that in rare situations a satellite's licensing administration simply may be a "flag of convenience" used to circumvent an ECO-Sat analysis. The U.S. obligations under the WTO Basic Telecom Agreement relate only to services and service suppliers of WTO Members; it does *not* relate to those of *non*-WTO countries. Thus, in appropriate cases, we would consider, as Lockheed Martin suggests, a system operator's principal place of business, and other relevant factors, and would not limit our inquiry to the licensing administration only.

54. We decline to adopt Columbia's proposal that we not apply the presumption in favor of competition for satellites licensed in WTO Members where the satellite is U.S.-owned.⁹¹ Columbia's concern that some U.S. companies might acquire licenses in WTO countries to avoid the U.S. regulatory process is misplaced. Any U.S. company that obtains a license in another country and later seeks to provide satellite services in the United States will be subject to the same rules and requirements as any other applicant.⁹² For example, a U.S.

⁸⁸ *Id.* at 7.

⁸⁹ GE Americom FNPRM Reply Comments at 3 n.4.

⁹⁰ *Notice* at ¶ 24.

⁹¹ Columbia FNPRM Comments at 6-7.

⁹² *See* Section III.B.3.b.

company that owns a foreign-licensed satellite will be required to demonstrate compliance with all Commission technical and qualification rules before we will permit it to serve the United States. Furthermore, adoption of Columbia's suggestion would restrict U.S. satellite operators' rights to obtain satellite licenses in any country of their choice, thereby infringing on independent business strategies and decisions. Finally, Columbia or any other entity will be free to demonstrate that provision of service in the United States by a U.S. owned, but not U.S.-licensed satellite would cause competitive harm in the United States.

(3) Route Markets

Background

55. In the *Notice*, the Commission proposed to consider the "route market" -- that is, the country where the satellite transmission will originate or terminate⁹³ -- when determining whether to grant a non-U.S. satellite access to the United States. For example, if a non-U.S. satellite licensed in Country X proposes to provide service between the United States and Countries A and B, the Commission would perform an ECO-Sat test on Countries X, A, and B. If Country B fails, service between the United States and Country B would be prohibited. The rationale for this proposal is that, if the non-U.S. applicant were permitted to serve Country B, it would have a competitive advantage over U.S. providers unable to serve that market. Such an approach also would provide no incentive for Country B to open its market to U.S. operators.

56. In refining the route proposals after the WTO Basic Telecom Agreement, the Commission proposed that it would not need to perform an ECO-Sat analysis on route markets originating or terminating in WTO Members' territories (WTO route market). It recognized, however, that there may be cases where an earth station applicant will want to access a WTO Member satellite to provide WTO-covered services between the United States and non-WTO markets.⁹⁴ The Commission stated that applying an ECO-Sat test to the non-WTO route markets would allow us to promote effective competition through broader market access.⁹⁵ The Commission's rationale was that a non-WTO country has no obligation to open its telecommunications markets to the United States or any other country. Thus, applying an ECO-Sat test to non-WTO route markets would allow us to open U.S. markets in a manner consistent with the objective of promoting a competitive satellite market in the United States.⁹⁶

⁹³ *Notice* at ¶ 27.

⁹⁴ *Further Notice* at ¶ 25.

⁹⁵ *Id.* at ¶ 25.

⁹⁶ *Id.*

57. At the same time, however, the Commission recognized that this proposal could have negative implications regarding U.S.-licensed satellites. It would be contrary to the policy adopted in an earlier Commission decision⁹⁷ allowing any satellite licensed in the United States to provide service to any foreign country without additional Commission authorization.⁹⁸ If the Commission applied an ECO-Sat test to a non-WTO route, it might have to apply it to U.S. satellites seeking to serve non-WTO routes because of national treatment concerns, which would limit the flexibility of those licensees.⁹⁹

58. As an alternative, the Commission proposed not to apply an ECO-Sat test in cases involving satellites licensed to WTO Members serving non-WTO routes, so as to afford these satellites the same flexibility as U.S. satellites.¹⁰⁰ In addition, it stated that concern regarding competition in non-WTO routes possibly could be remedied by prohibiting non-U.S. licensed satellites from entering into exclusive arrangements with the country in which they wish to operate -- a prohibition currently imposed on most U.S. licensed systems.¹⁰¹

Positions of the Parties

59. Most parties commenting on the *Further Notice* argue that the ECO-Sat test should not apply when a WTO satellite is serving a non-WTO route.¹⁰² Generally, these commenters agree that if we were to apply the ECO-Sat test to non-U.S. satellites under the U.S. national treatment obligation, we might be obligated to apply the same test to U.S. companies -- a result the commenters oppose because it would defeat the objective of *DISCO*

⁹⁷ *Amendment of the Commission's Regulatory Policies Governing Domestic Fixed-Satellite and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996) (*DISCO I*).

⁹⁸ *Further Notice* at ¶ 26.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 27.

¹⁰¹ *Id.*

¹⁰² COMSAT FNPRM Comments at 7-8; COMSAT FNPRM Reply Comments at 2, 4-5; European Commission FNPRM Reply Comments at 4; France Telecom Reply Comments at 5, note 4; GE Americom Comments at 3-5; GE Americom FNPRM Reply Comments at 1-3; GlobeCast FNPRM Comments at 3-4; Government of Japan FNPRM Comments at 2; Hughes FNPRM Comments at 8-9; Hughes FNPRM Reply Comments at 4; ICO FNPRM Comments at 12-15; ICO FNPRM Reply Comments at 4; Japan Sat FNPRM Comments at 2; Lockheed Martin FNPRM Comments at 4-5; Lockheed Martin FNPRM Reply Comments at 2, 6; Loral FNPRM Comments at 4-6; Motorola FNPRM Comments at 5 and n.12; PanAmSat FNPRM Comments at 4-5; Qualcomm FNPRM Comments at 4-5; Space Communications FNPRM Reply Comments at 7; Teledesic FNPRM Comments at 3-4. *Compare* Orion FNPRM Reply Comments at 3-4.

I and burden U.S. licensed systems serving non-WTO routes.¹⁰³ The Government of Japan requests that, with a view toward promoting multilateral liberalization and expanding the telecommunications market worldwide, we should ensure GATS consistency, especially national treatment, and not apply the ECO-Sat test in this context.¹⁰⁴

60. Commenters generally advocate that instead of the ECO-Sat test, we should apply the presumption in favor of entry where a WTO-licensed satellite seeks to provide service to or from the United States, regardless of whether the route is a WTO Member or not.¹⁰⁵ Teledesic contends that, although it is theoretically possible for a foreign operator to gain a competitive advantage over U.S. operators by entering non-WTO routes that are closed to U.S. operators, based on the number and scope of the market access commitments in the WTO Basic Telecom Agreement, the likelihood is "insufficient to justify the re-regulation of international satellite services."¹⁰⁶ COMSAT specifically advocates that the corresponding burden on the opposing party to demonstrate a very high risk to competition apply as well.¹⁰⁷

61. Columbia contends that, where a satellite is licensed by a WTO Member, and the entity that controls the satellite is from a non-WTO country that is the route market to be served, we should apply an ECO-Sat test to the non-WTO route market.¹⁰⁸ According to Columbia, a company from a country not subject to WTO requirements and dispute resolution procedures should not be able to avoid the ECO-Sat test simply by obtaining a license from a WTO Member.¹⁰⁹ Columbia asserts that this approach should help deter forum shopping by companies that benefit in their actual home markets from restrictive entry policies.¹¹⁰ It claims that this approach would not violate national treatment because the same test would be applied if the foreign-controlled company sought a U.S. license directly to serve its non-WTO

¹⁰³ See e.g., COMSAT FNPRM Comments at 7-9; European Commission FNPRM Reply Comments at 4; France Telecom Comments at 5 n.4; Government of Japan FNPRM Comments at 2; Hughes FNPRM Comments at 8-9; ICO FNPRM Comments at 13; Motorola FNPRM Comments at 5 and n.12; Orion FNPRM Reply Comments at 3-4; Qualcomm FNPRM Comments at 4; Skybridge FNPRM Comments at 5; Teledesic FNPRM Comments at 3.

¹⁰⁴ Government of Japan FNPRM Comments at 2.

¹⁰⁵ E.g., COMSAT FNPRM Comments at 8; GE Americom FNPRM Comments at 4; ICO Comments at 13.

¹⁰⁶ Teledesic FNPRM Comments at 3-4.

¹⁰⁷ COMSAT FNPRM Comments at 7-8.

¹⁰⁸ Columbia FNPRM Comments at 4-5. Thus, according to Columbia, an ECO-Sat test should apply, for example, where a space station is licensed in South Africa, controlled by an entity from China, and that entity seeks to provide service from the United States to China.

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.*

market.¹¹¹ Hughes disagrees, arguing that national treatment requires the Commission to afford all foreign-licensed satellites providing covered services the same opportunities that U.S. satellites are afforded under *DISCO I*.¹¹²

62. Some parties suggest methods for guarding against market distortions that could result from service to a non-WTO country by a WTO-licensed satellite. COMSAT states that we should grant such applications absent a demonstration that authorizing service between the United States and a non-WTO country would pose a very high risk to competition in the U.S. satellite market that could not be addressed by conditions on the grant of the authorization.¹¹³ Several other parties suggest extension of the rule prohibiting U.S.-licensed satellites from entering into exclusive arrangements with non-U.S. satellites.¹¹⁴ This would ensure that no satellite system of a WTO Member that provides service in the United States can gain an unfair advantage in any foreign market.¹¹⁵ GE Americom points out, however, that in some markets, a *de facto* policy of exclusivity may exist even in the absence of an exclusive route agreement with the satellite services provider, and suggests that we consider this possibility in evaluating whether service to a given non-WTO route creates a risk to competition.¹¹⁶

63. PanAmSat supports not applying the ECO-Sat test to avoid creating a procedure "for a problem that may prove non-existent."¹¹⁷ PanAmSat also recommends, however, that the Commission reconsider applying the ECO-Sat test to the route market if competitive disparities arise between U.S. licensees and other WTO Member licensees.¹¹⁸ GE

¹¹¹ *Id.*

¹¹² Hughes FNPRM Reply Comments at 4-5.

¹¹³ COMSAT FNPRM Comments at 7-8.

¹¹⁴ GlobeCast FNPRM Comments at 3; Hughes FNPRM Comments at 9; Hughes FNPRM Reply Comments at 5; Loral Comments at 6; Orion FNPRM Reply Comments at 3-4; COMSAT FNPRM Reply Comments at 5; Qualcomm FNPRM Comments at 4-5.

¹¹⁵ Orion questions whether we have the authority to impose such a prohibition on WTO Members, absent a showing that the exclusive arrangement will have a "very high risk to competition." Orion FNPRM Comments at 14-15. We disagree. *See infra* Section III.B.4.a.

¹¹⁶ GE Americom FNPRM Comments at 4. Orion supports this position. Orion FNPRM Reply Comments at 4.

¹¹⁷ PanAmSat FNPRM Comments at 5.

¹¹⁸ *Id.* at 5.

Americom, Orion, and COMSAT concur.¹¹⁹ PanAmSat suggests further that if we were to apply the ECO-Sat test, we could employ a rebuttable presumption that the provision of service between the United States and a non-WTO route market by both U.S.-licensed satellites and other WTO Member satellites is in the public interest.¹²⁰ The presumption then could be overcome regarding a particular non-WTO route market upon a demonstration that U.S. licensees are not afforded access to such market. According to PanAmSat, if service to the non-WTO route market would not serve the public interest, then neither U.S.-licensed satellites, nor satellites licensed by other WTO Members, would be permitted to serve the route. PanAmSat contends that because the presumption would apply equally to U.S. licensed satellites and other WTO Member-licensed satellites, it would satisfy national treatment.¹²¹

Discussion

64. As suggested in the *Further Notice*,¹²² and overwhelmingly endorsed in the record, we will not evaluate the effective competitive opportunities in the route market for non-U.S. satellites licensed by a WTO Member providing WTO-covered services. Thus, we will not perform an ECO-Sat test on *any* route, whether a WTO route market or a non-WTO route market. We take this approach for two reasons.

65. First, we do not currently evaluate the route markets served by U.S.-licensed satellite systems. In *DISCO I*, we permitted U.S. satellites to provide both domestic and international services according to their business plans, regardless of the route. The purpose of this approach was to provide licensees flexibility in system offerings and encourage development of global, innovative services for the benefit of U.S. consumers. That policy is equally compelling today and we will continue to follow it. Furthermore, as the majority of parties asserted, applying a route market analysis to non-U.S. satellites licensed by WTO Members providing WTO-covered services, while not doing so for U.S.-licensed satellites, could raise national treatment concerns. We find that we can further our procompetitive objectives and at the same time address any potential anticompetitive concerns resulting from service on a non-WTO route by prohibiting a non-U.S. licensed satellite from entering an exclusive arrangement with the country it wishes to serve, a restriction that currently applies to U.S.-licensed satellites as well.¹²³ Moreover, parties are free to raise concerns that entry by

¹¹⁹ GE Americom FNPRM Reply Comments at 8-9; Orion FNPRM Reply Comments at 4 n.9; COMSAT FNPRM Reply Comments at 5.

¹²⁰ PanAmSat FNPRM Comments at 5-6, n.10.

¹²¹ *Id.*

¹²² *Further Notice* at ¶ 28.

¹²³ We agree with Teledesic, for example, that the likelihood of competitive harm in the United States from a foreign operator serving non-WTO routes that are closed to U.S. operators is not sufficient to justify a change in our flexible regulatory policies.

the WTO satellite will create anticompetitive consequences in the U.S. market because of a closed route market.

66. Our second consideration relates to the GATS and the benefits of the WTO Basic Telecom Agreement. As described above, because all WTO Members are governed by the general obligations of the GATS, including MFN and transparency, the GATS provides some protection against discriminatory conduct on a route. In addition, increased competition in the global satellite market resulting from commitments in the WTO Basic Telecom Agreement, and the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market.

67. Further, we find it unnecessary to adopt Columbia's suggestion that we apply an ECO-Sat analysis to a non-WTO route market where the satellite is licensed by a WTO Member and the controlling entity is from a non-WTO route market.¹²⁴ As previously discussed, we will look to the ownership of the satellite, rather than to the licensing administration, if we are presented with evidence that the licensing administration is simply a "flag of convenience" used to circumvent an ECO-Sat analysis.¹²⁵ Finally, we do not adopt a rule requiring us to apply an ECO-Sat analysis to the route market where competitive disparities arise between U.S. licensees and other WTO Members, as PanAmSat suggests, or a rule requiring us to consider *de facto* exclusivity in the absence of an exclusive route agreement, as GE Americom suggests. In all cases, where the presumption in favor of entry applies and we do not conduct an ECO-Sat analysis, opponents may demonstrate that entry will nevertheless pose a risk to competition in the United States, and in the exceptional case in which grant would pose a very high risk that cannot be cured by conditions placed on the license, we will deny the application. We will thus examine whatever potential competitive harms exist in this context, which is consistent with international agreements and should satisfy both PanAmSat's and GE Americom's concerns.

¹²⁴ Columbia FNPRM Comments at 4-5.

¹²⁵ See *supra* Section III.B.1.a.2.

b. Non-WTO Member Satellites Providing WTO-Covered Services

(1) General Framework

Background

68. In the *Notice*, the Commission proposed to examine "effective competitive opportunities" in both the foreign "home market" of the non-U.S. satellite and "route markets" to which service from a U.S. earth station is proposed.¹²⁶ Thereafter, in the *Further Notice*, the Commission tentatively concluded that an ECO-Sat test should be applied with respect to the home markets of satellites licensed by non-WTO countries, regardless of whether the route market is a WTO Member country or not. Further, the Commission proposed to apply a separate ECO-Sat test to the route market when the route market is a different non-WTO country.¹²⁷ The Commission proposed to continue to apply an ECO-Sat test in these circumstances because non-WTO countries have assumed no obligations under the WTO Basic Telecom Agreement specifically or under the GATS generally. They have made no binding commitments to open their satellite services markets or to abide by procompetitive regulatory principles. Thus, reasoned the Commission, allowing non-U.S. satellites licensed by non-WTO countries to serve the United States could adversely affect competition in the United States by giving the non-U.S. operator a competitive advantage over its U.S. counterparts.

Positions of the Parties

69. The commenters generally support implementation of an ECO-Sat analysis in this context.¹²⁸ Many contend that, absent a home market analysis, the Commission would

¹²⁶ *Notice* at ¶¶ 2, 27, 37-43; *see also Further Notice* at ¶ 4.

¹²⁷ *Further Notice* at ¶ 23.

¹²⁸ We also incorporate here those comments filed in response to the *Notice* that remain pertinent to the general discussion of the ECO-Sat test. *See, e.g.*, AT&T NPRM Comments at 5; Columbia NPRM Comments at 11; General Instrument NPRM Comments at 3; HBO NPRM Comments at 12-13; ICO NPRM Comments at 10-23; Keystone NPRM Comments at 4-5; Lockheed Martin NPRM Comments at 3-4; MCI NPRM Comments at 3-12; PanAmSat NPRM Comments at 2-3; OrbComm NPRM Comments at 3; Orion NPRM Comments at 6-12; Teledesic NPRM Comments at 3-4; Lockheed Martin FNPRM Comments at 3-4; Orion FNPRM Comments at 6; Qualcomm FNPRM Comments at 5; Motorola FNPRM Comments at 5; GE Americom Reply Comments at 5; Lockheed Martin Reply Comments at 6; GE Americom FNPRM Comments at 5 (making a distinction in evaluating applicants from non-WTO countries by urging that the Commission evaluate the home market of the *foreign-licensed provider*).

have no relevant basis for evaluating the accessibility of a non-WTO market or for exercising any leverage to persuade those countries with closed markets to open them.¹²⁹

70. Some commenters argue that application of the ECO-Sat test may harm U.S. licensed systems seeking access to foreign markets and may result in retaliatory measures from other countries.¹³⁰ CC/Networks claim that they rely on satellite technology for overseas video and associated audio transmissions and consider transoceanic fiber less efficient regarding cost, connectivity, technical performance, and operational flexibility.¹³¹ They argue that limiting broadcast and cable operators' use of satellite capacity will hinder their ability to provide television coverage of international events, especially fast-breaking news.¹³² To the contrary, Columbia argues that we should apply the ECO-Sat test to all types of services in a fair and even-handed manner.¹³³ It maintains that Networks's need for transmission capacity can best be met by considering, as part of the general public interest inquiry, whether U.S. satellites are available to provide this transmission capacity.

71. A few commenters favor a less rigid ECO-Sat test, which would permit each applicant to demonstrate whether a home market test, route market test, or critical mass test, is appropriate for its proposal.¹³⁴ In order to remedy concerns about foreclosing competitive entry by U.S.-licensed satellites into foreign markets, Hughes proposes that we generally allow entry of foreign-licensed satellites into the United States to compete in the provision of satellite services, absent a showing that the licensing administration imposes significant protectionist barriers that shield its satellite industry from competition.¹³⁵ Hughes argues that, by applying the ECO-Sat test in this flexible manner, the Commission can best demonstrate to foreign administrations the benefits of implementing a procompetitive satellite regulatory policy.¹³⁶ Hughes notes that none of the parties disputed its proposal for a modified ECO-Sat

¹²⁹ Orion FNPRM Comments at 6; Qualcomm FNPRM Comments at 5; Motorola FNPRM Comments at 5.

¹³⁰ PanAmSat FNPRM Comments at 4-5; Hughes FNPRM Comments at 5; COMSAT FNPRM Reply Comments at 6.

¹³¹ CC/Networks NPRM Comments at 12.

¹³² *Id.*

¹³³ Columbia FNPRM Reply Comments at 5-6.

¹³⁴ Telesat NPRM Reply Comments at 14.

¹³⁵ Hughes FNPRM Comments at 12.

¹³⁶ *Id.* Hughes proposes that an earth station applicant seeking access to a non-U.S.-licensed satellite would have the initial burden of demonstrating that the foreign satellite's home and route markets do not impose *de jure* barriers to U.S.-licensed satellites seeking to compete in the provision of the same satellite services. If no *de jure* barriers existed, the burden would shift to parties opposing entry of the foreign-licensed satellite to

(continued...)

test.¹³⁷ In addition, Hughes argues that none of the parties deny that a strict reciprocity test will undermine the Commission's goal of opening foreign markets to competition if foreign administrations impose equally rigid reciprocity tests to evaluate the entry by U.S.-licensed satellites.¹³⁸

Discussion

72. We adopt the proposal to apply the ECO-Sat test to non-U.S. satellites licensed by non-WTO countries. This approach is necessary to ensure that participants in the global satellite services market are on equal footing and that applicants from non-WTO countries are not able to distort competition to the detriment of U.S. operators. Fair and vigorous competition among multiple providers leads to lower prices and more innovative service offerings for satellite communications users in the United States and throughout the world. Applying the ECO-Sat test will confirm that foreign markets do not have *de jure* or *de facto* barriers that impede opportunities for U.S. providers to enter and compete in those markets prior to permitting operators from such countries to compete in the United States. Unlike WTO Members, including those that have not made specific commitments of market access, non-WTO countries are not subject to the general obligations of the GATS. Most non-WTO countries have made little progress toward promoting competition and opening their markets. To the extent that some have allowed foreign entry and have begun to liberalize their markets, they are not obliged under the GATS to refrain from discriminating against U.S.-licensed satellite operators. Thus, the potential for anticompetitive conduct continues to exist with respect to applicants from non-WTO countries.

73. For these reasons, we are not persuaded by the commenters' arguments against applying the ECO-Sat test to non-U.S. satellites licensed by non-WTO countries. In response to some commenters' concerns about possible negative effects of this rule on the efforts of U.S.-licensed systems to access foreign markets, we point out that our primary focus is on increasing competition in the United States market, and on realizing the benefits of such competition for U.S. users here.¹³⁹ If this policy causes other countries to adopt an ECO-Sat test for U.S. satellite operators seeking to provide service in that country, we find it, on balance, a minimal burden when compared to the possibility that unrestricted entry by

¹³⁶(...continued)

demonstrate that *de facto* barriers existed on the satellite's home or route markets. Hughes adds that the Commission would consider next, "communications and competition-related issues as well as national security, foreign policy and trade issues raised by the Executive Branch." *Id.* at 13.

¹³⁷ Hughes FNPRM Reply Comments at 7.

¹³⁸ *Id.*

¹³⁹ We also recognize, however, that the opening of markets abroad also will facilitate greater competition in the satellite services market worldwide, including in this country, and the policies we adopt today are also designed to further that goal.

foreign-licensed satellite systems would distort competition in the U.S. market. Hughes's proposed test would not suffice because, for example, Country X may permit *some* foreign satellites to serve its market while blocking U.S. satellites, falling short of Hughes's "significant protectionist barrier" measure. If we permit a satellite licensed by Country X to serve the U.S. market, that operator could have a competitive advantage in the United States because of its more comprehensive service offerings. Indeed, competition could be distorted in the United States even if a foreign country does allow entry by U.S. satellites if that country erects obstacles that prevent such competition from being effective as a practical matter, such as government subsidization of the non-U.S. system. In this case, the non-U.S. operator could have a competitive advantage in the United States because of an ability to offer lower-cost service. Consequently, we find that our proposed test for determining whether U.S. operators have effective competitive opportunities in a foreign country provides an even-handed approach that allows the greatest degree of access to non-U.S. systems consistent with the public interest. In addition, we reject Hughes's suggested ECO-Sat test.¹⁴⁰ It is equally necessary to examine both *de jure* and *de facto* barriers because *de facto* barriers can be as impeding as *de jure* barriers and more difficult to detect. Hence, the applicant should bear the burden to demonstrate the absence of both.

74. We recognize the Networks' concern that our policy could inhibit the coverage of fast-breaking news or other special events. We point out, however, that we will *not* apply an ECO-Sat test in the vast majority of cases where the Networks will be receiving foreign video transmissions. In particular, we will not apply an ECO-Sat test when the satellite relaying the foreign transmissions into the United States is licensed by a WTO Member, or, as discussed below, is operated by an IGO affiliate satellite or an IGO satellite providing international service.¹⁴¹ We will apply the ECO-Sat test only where the satellite is licensed by a non-WTO country. In these cases, an ECO-Sat test is a minimal burden compared to the market distorting impact and competitive harm in the United States that may result if a U.S.-licensed system is denied access in the relevant foreign market. Further, the Networks may apply for an earth station license to communicate with specified non-WTO satellites. In considering whether to grant that application, we could consider, regardless of the outcome of the ECO-Sat analysis, whether other satellites are available to provide this transmission capacity. An earth station license carries a ten-year license term; no further applications will be necessary for the Networks to access that non-WTO satellite once a license is granted.

75. In applying the ECO-Sat test, we will examine whether the country in which the non-U.S. satellite is licensed provides effective competitive opportunities for U.S.-licensed satellites to serve the foreign market. We will look at *de jure* barriers to entry, such as statutory or regulatory prohibitions against service by U.S. providers, as well as *de facto*

¹⁴⁰ See *supra* n.136.

¹⁴¹ See *infra* Sections III.B.1.d. and II.B.2.

barriers. For example, a country may permit U.S. entities to provide FSS service, but impose more stringent technical requirements on U.S. providers than on its own providers.

(2) Home Markets

Background

76. In the *Notice*, the Commission proposed to look first at the country of license, or the "home market," when evaluating effective competitive opportunities for U.S. providers.¹⁴² For example, if a satellite licensed by Country X seeks to serve the U.S. market, the first step would be to determine whether U.S.-licensed satellites may provide analogous services to, from, or within Country X. The Commission recognized, however, that the country of license approach had two shortcomings. First, if the Commission were to look only at the licensing country, satellite operators from closed markets might seek to obtain a satellite license from a country with an open market. In effect, such satellite operators could forum shop to find an administration that would most likely pass the ECO-Sat test. The Commission therefore sought comment on the possibility of looking at ownership in addition to the country of license, for example, evaluating each investor's home country or those of the most substantial investors.¹⁴³

Positions of the Parties and Discussion

77. Commenters supporting application of an ECO-Sat test uniformly support applying this test to the "home market" of the satellite.¹⁴⁴ Some question, however, whether the "home market" should be the country that licenses a satellite or the administration that coordinates it or some other measure, such as the nationality or principal place of business of the owner. For reasons discussed above in determining the WTO status of the satellite in question,¹⁴⁵ we will look to the licensing country or coordinating administration to determine the home market. In determining the home market, we will, however, entertain requests to consider other factors, such as the nationality or principal place of business of the owner.¹⁴⁶

¹⁴² *Id.* at ¶ 18.

¹⁴³ *Notice* at ¶ 30.

¹⁴⁴ Lockheed Martin FNPRM Comments at 3, Orion FNPRM Comments at 6.

¹⁴⁵ *See supra* Section III.B.1.a.2.

¹⁴⁶ *See id.*

(3) Route Markets

Background

78. In the *Notice*, the Commission proposed to conduct a separate ECO-Sat analysis of the "route market" or markets if different from the home market. It defined the route market as the market in which the satellite transmission originates or terminates.¹⁴⁷ The Commission stated that applying an ECO-Sat test to the non-WTO route markets would allow it to promote effective competition through broader market access. Specifically, because some countries may offer landing rights to satellites from certain foreign countries but not others, U.S. satellites may have opportunities to compete in some route markets but not others. Making a decision on market access for a non-U.S. system based solely on the openness of that system's home market would therefore leave open the possibility that the non-U.S. satellite, once it entered the U.S. market, might be able to serve some routes on which U.S. satellites are prevented from competing. This result would distort competition in the United States. Consequently, in the *Further Notice*, the Commission proposed that when a non-WTO satellite provides service involving a different non-WTO market, it would apply two separate ECO-Sat tests: the first test would be applied on the non-WTO home market as discussed above; the second ECO-Sat test would be conducted on the non-WTO route market. If the non-WTO route market did not provide U.S. operators with effective competitive opportunities to serve that market, the Commission would not permit the non-U.S. satellite to provide any service between the United States and that route market.

Positions of the Parties

79. Most commenters agree that a route market ECO-Sat test is necessary to avoid distortion of competition.¹⁴⁸ They contend that a separate ECO-Sat test should be applied to each non-WTO route market. Some commenters, however, argue that the ECO-Sat test should not be applied in cases where, as a practical matter, only non-WTO satellites can access the route market.¹⁴⁹ Qualcomm, for example, argues that application of the ECO-Sat test would only delay the implementation of innovative satellite services where effective competitive opportunities for U.S.-licensed or other WTO Member satellites cannot effectively exist.¹⁵⁰

¹⁴⁷ *Notice* at ¶ 27.

¹⁴⁸ See, e.g., DirecTV NPRM Comments at 12-14; MCI NPRM Comments at 6-7; PanAmSat NPRM Comments at 2-3; WorldCom NPRM Comments at 5.

¹⁴⁹ Qualcomm FNPRM Comments at 5; KDD NPRM Comments at 2.

¹⁵⁰ Qualcomm FNPRM Comments at 5.

80. Lockheed Martin, on the other hand, does not endorse the application of an ECO-Sat test to route markets.¹⁵¹ Lockheed Martin believes that if a satellite operator is subject to competition in its home market then it is significantly less likely to have market distorting capabilities in other route markets that it serves.¹⁵²

81. Other commenters, while not opposing a route market analysis in theory, argue that route markets are difficult to define¹⁵³ or that a route market test is insufficient because, in certain situations, *de facto* barriers may be difficult to prove.¹⁵⁴ CC/Networks recommends that the Commission allow all U.S.-authorized earth station licensees to access non-U.S. satellites immediately for specified route markets once a non-U.S. satellite has satisfied the ECO-Sat test requirements.¹⁵⁵ Further, ICO argues that a route market analysis would be impractical with global satellite systems, such as mobile satellite service (MSS) systems, that could conceivably serve over 200 countries.¹⁵⁶ COMSAT agrees that applying an ECO-Sat test in these circumstances could, in fact, impede the development of the global MSS market.¹⁵⁷

Discussion

82. We adopt the following rules regarding non-U.S. satellites licensed by non-WTO Members: We will *not* apply an ECO-Sat test to *WTO* Member route markets served by non-U.S. satellites licensed by non-WTO countries. We will, however, apply an ECO-Sat test to *all non-WTO* route markets served by non-U.S. satellites licensed by non-WTO countries. If a non-WTO satellite serves one or more different non-WTO route markets, we will apply an ECO-Sat test to the non-WTO home market, as well as an ECO-Sat test to each non-WTO route market. Discussion of each rule follows.

83. First, as to *WTO* routes, we will not apply an ECO-Sat test here for the same reasons discussed above regarding *WTO*-Member-licensed satellites.¹⁵⁸ As stated, all *WTO* Members are governed by the general obligations of the GATS. The GATS provides some

¹⁵¹ Lockheed Martin FNPRM Reply Comments at 6.

¹⁵² *Id.* at 6.

¹⁵³ Loral NPRM Reply Comments at 6; Transworld NPRM comments at 2-3.

¹⁵⁴ Lockheed Martin FNPRM Comments at 3; Lockheed Martin FNPRM Reply Comments at 2.

¹⁵⁵ CC/Networks NPRM Comments at 22.

¹⁵⁶ ICO FNPRM Comments at 13-14.

¹⁵⁷ COMSAT FNPRM Reply Comment at 5.

¹⁵⁸ *See supra* Section III.B.1.a.3.

protection against discriminatory conduct on a WTO route. In addition, increased competition in the global satellite market resulting from commitments under the WTO Basic Telecom Agreement and the regulatory mechanisms available to us and our trading partners to guard against anticompetitive consequences, will help prevent harm to competition in the U.S. market.

84. Second, as to *non-WTO* routes, it is necessary to apply an ECO-Sat test to all routes because the home market inquiry is, by itself, insufficient to protect U.S. satellite operators from distortion in the U.S. satellite market. Each satellite typically covers many different countries and a satellite's point-to-multipoint capability makes it possible for the same satellite to be used simultaneously for transmissions between other countries and the United States. U.S. satellite operators must obtain an authorization from all countries in which they seek to provide service. It is possible that certain *non-WTO* countries may prohibit access by U.S. satellites, while allowing access by satellites from other countries. In this scenario, the *non-U.S.* satellite granted access to that market would have a competitive advantage over U.S. systems by virtue of its broader service area. We cannot ignore this potential competitive distortion.

85. We recognize that applying an ECO-Sat analysis to each *non-WTO* route market served by a global satellite system, such as a low-earth orbit MSS or a fixed-satellite service system, will be cumbersome. An alternative would be to determine whether there is some critical mass of route markets open to U.S. satellite systems to satisfy us that effective competition will not be distorted in the United States. If so, we could dispense with a route-by-route analysis for global systems altogether. The commenters' positions varied on what would constitute a critical mass of open route markets, and on how to determine whether a critical mass has been reached.

86. We find that there is no single method to measure whether a critical mass has been reached that would work in every case. This is because, from a provider's perspective, critical mass depends in large part upon its individual business plans. For example, a company intending to provide global service may be satisfied that a critical mass has been achieved if a majority of the world's largest markets are open to U.S. satellite services. A country targeting the Asian market could, in contrast, legitimately argue in the same environment that a critical mass has *not* been reached if several of the world's closed markets are in Asia. Consequently, we cannot devise a critical mass test that would uniformly apply to all satellite services. We also are concerned that a critical mass test would not encourage countries to open closed markets to U.S. satellite services, to the detriment of U.S. consumers. We conclude that the most practical approach, and the most appropriate and forceful way to promote competition in the United States and around the world, is to look at each of the actual routes that will be served. Thus, we will apply an ECO-Sat test to each *non-WTO* route market served by a *non-WTO* satellite.

87. We disagree with Lockheed Martin, the only party that opposes generally applying a route market ECO-Sat analysis, which argues that the test is not necessary because

competition in the *route* market is not likely to be distorted if the satellite operator is subject to competition in its home market. Contrary to that position, our route market analysis is designed to promote competitive conditions in the *United States* by addressing a non-U.S. system's ability to serve markets not open to U.S. operators.

88. In response to Qualcomm's suggestion that we not apply the ECO-Sat test where *only* non-WTO countries are able to serve a route market, we point out that we will consider such circumstances in applying the ECO-Sat test. For example, if U.S. operators are not serving a particular route market because they do not have satellites with coverage areas allowing them to serve that route, the non-WTO satellite providing service to that route market would not fail the ECO-Sat test on that basis. In that case, we would not preclude a non-U.S. satellite from providing service between the United States and that market. In applying the ECO-Sat test, we are looking for *artificial* barriers blocking access to that market by U.S. operators.

(4) Satellite Service Distinctions

Background

89. In applying the ECO-Sat test, the Commission proposed in the *Notice* to focus on the specific satellite service that the non-U.S. system seeks to provide in the United States and determine whether U.S. satellite systems would be permitted to provide the same type of service in the relevant foreign country. For example, if there were a request to provide mobile-satellite service (MSS) in the United States using a satellite licensed by non-WTO Country X, the ECO-Sat analysis would focus on whether a U.S. satellite could provide MSS in Country X.¹⁵⁹ The Commission proposed to look at three service categories in making this analysis: DTH (including DBS service), Fixed Satellite Service (FSS) and MSS. The Commission noted, however, that if another country draws finer distinctions when considering whether to allow U.S. satellites to provide services (such as distinguishing between Very Small Aperture Terminal (VSAT) and voice fixed-satellite services), it might consider applying the same distinctions when considering a request involving a satellite licensed in that country.¹⁶⁰

90. Nevertheless, the Commission recognized in the *Notice* that this basic approach may not be adaptable to all satellite services in all instances. For example, an MSS system providing service between the United States and another country could consist of satellite transmissions that do not involve earth stations in the United States. By illustration, a telephone call could travel via an MSS system link from a telephone in the United States by cable to Poland, and then from there by satellite to China, where it could be received by a

¹⁵⁹ *Notice* at ¶ 33-34.

¹⁶⁰ *Id.*

handheld telephone (earth station). The Commission pointed out that because the earth station is in a foreign country and would be licensed by that country, there would be no vehicle by which to apply an ECO-Sat analysis. Given this, it proposed to evaluate effective competitive opportunities for MSS providers on a global basis by considering whether some critical mass of foreign markets is open to U.S. licensed systems before a non-U.S. system could provide *any* service in the United States.

Positions of the Parties

91. Most commenters support our proposal to adopt a service-by-service approach in applying the ECO-Sat test so as to ensure effective competition regarding each service.¹⁶¹ Indeed, DirecTV asks us to consider new services as they evolve.¹⁶² Columbia suggests that we further subdivide service categories to include video, voice, and data services.¹⁶³ AirTouch objects to the critical mass alternative to cover satellite service systems that do not have a satellite component in the United States. AirTouch asserts that the critical mass approach would be burdensome to administer because it would be difficult to determine which markets are relevant and sufficiently open to warrant regulatory streamlining, and that the approach would create too much uncertainty for foreign providers trying to plan their businesses.¹⁶⁴

Discussion

92. We adopt the proposal to apply the ECO-Sat test, when applicable, on a satellite-service-specific basis. As recognized in the *Notice*, we may find that a particular country permits U.S. satellites to provide some, but not all, satellite services. We agree with the commenters that in these cases the public interest would be best served by permitting satellites licensed by such a country to enter the U.S. market to provide those services that can be competitively offered by U.S. satellites in that country, but not for other satellite services. We also adopt the proposal to specify DTH (including DBS service), FSS, and MSS as our service categories in applying the ECO-Sat test. Consistent with our treatment of voice and non-voice MSS in the same service category for ECO-Sat purposes, we will consider DARS, an audio satellite service established after the *Notice* was issued that provides service directly to consumers, in the same category as DTH. We may further subdivide these categories, as Columbia suggests, if another country makes such distinctions in deciding

¹⁶¹ AT&T NPRM Comments at 7; DirecTV NPRM Comments at 14-15; General Instrument NPRM Comments at 4; HBO NPRM Comments at 15; Loral NPRM Comments at 25; Motorola NPRM Comments at 19; MCI NPRM Comments at 12; Telesat NPRM Reply Comments at 17-18; WTCI NPRM Comments at 12.

¹⁶² DirecTV NPRM Reply Comments at 14; General Instrument NPRM Comments at 4.

¹⁶³ Columbia NPRM Comments at 13.

¹⁶⁴ AirTouch FNPRM Comments at 3-4.

whether to allow U.S. satellite systems to serve its market. We find, however, that it will be sufficient and administratively simpler to apply the three broader service categories as a rule of thumb.

93. We will not adopt the proposal to require some critical mass of foreign markets to be open to U.S. satellite operators before we would permit a non-WTO MSS system to provide the landline portion of its service in the United States. As previously discussed, there is no objective way in which to define a critical mass and such a standard would not, in any case, further our goals of opening markets and promoting global competition. Rather, we will rely on the policies and rules adopted in our companion *Foreign Participation Report and Order* to govern foreign entry through terrestrial facilities.

c. Non-WTO Covered Services

Background

94. As discussed above, the U.S. Schedule of Specific Commitments to the WTO Basic Telecommunications Agreement excludes DTH, DBS, and DARS.¹⁶⁵ Many other WTO Members, including many of the United States' major trading partners, did not include these services in their market access commitments, creating a potential market imbalance. To resolve this imbalance, the United States made no market access or national treatment commitments and took an MFN exemption for these services.

95. Thus, because the WTO Basic Telecom Agreement will not do as much to advance our goal of promoting a competitive satellite marketplace for these services, in the *Further Notice*, the Commission proposed to apply the ECO-Sat test to all requests for access by non-U.S. satellite systems for delivery of DTH, DBS, and DARS services into the United States.¹⁶⁶ In conducting an ECO-Sat test, the Commission proposed to evaluate both *de jure* and *de facto* constraints on entry by U.S. satellite operators.¹⁶⁷ The Commission sought comment on the continuing need to encourage open markets for these services, and on the application of an ECO-Sat test to achieve that goal.

¹⁶⁵ See *supra* Section III.B.1.a.1.

¹⁶⁶ *Further Notice* at ¶ 20-22.

¹⁶⁷ *Notice* at ¶¶ 37-42; *Further Notice* at ¶ 4.

Positions of the Parties

96. Several commenters support the proposal to use an ECO-Sat test for non-covered services.¹⁶⁸ MPAA recommends, however, that the Commission include in its rules provision for eliminating the ECO-Sat test should future GATS negotiations yield market access commitments by WTO Members that provide an open, competitive global environment with respect to DTH, DBS, and DARS services, allowing the United States to remove its MFN exemptions in these services.¹⁶⁹ Hughes further argues that the ECO-Sat test should bar entry only where a foreign country imposes significant protectionist barriers against U.S.-licensed satellites.¹⁷⁰

97. Many commenters, however, object to applying the ECO-Sat test to these non-covered services.¹⁷¹ Specifically, the European Commission argues that the U.S. MFN-exemption might negatively impact the economic viability of non-U.S.-licensed satellite systems, since satellite systems normally provide both telecommunications and DTH-DBS transmission services. The scope and economic impact of the U.S. MFN exemption, the European Commission contends, depend on the "precise definition of DTH and DBS television services, and of digital audio services," which the European Commission urges us to define.¹⁷² The European Commission also claims that these services are broadcast services and therefore the United States is required to provide market access and MFN treatment under its 1994 WTO commitments on audio visual services.¹⁷³

Discussion

98. We will apply the ECO-Sat test to requests involving provision of DTH, DBS, and DARS by non-U.S. satellites. Specifically, we will apply the test to the home market of the non-U.S. satellite, as well as to all routes that the non-U.S. satellite proposes to serve.

¹⁶⁸ Lockheed Martin FNPRM at 5; MPAA FNPRM Reply Comments at 2; Hughes FNPRM Comments at 13-14 (arguing that the modified ECO-Sat test applied on a service-by-service basis, affords foreign administrations flexibility to open their markets to competition).

¹⁶⁹ MPAA FNPRM Reply Comments at 3.

¹⁷⁰ Hughes uses Canada as an example where Canada continues to impose barriers that prevent U.S.-licensed DBS and DTH service providers from competing in the Canadian market resulting in providers such as DIRECTV's Canadian affiliate being barred from the Canadian market. Hughes FNPRM Comments at 16.

¹⁷¹ Networks FNPRM Comments at 5; European Commission FNPRM Reply Comments at 3.

¹⁷² European Commission FNPRM Reply Comments at 3.

¹⁷³ *Id.*

The ECO-Sat test is necessary because of the continuing need to encourage open markets for these services and to avoid anticompetitive conduct in the U.S. market.¹⁷⁴

99. In applying the ECO-Sat test, we will examine effective competitive opportunities for U.S.-licensed satellites to serve the foreign markets. We will look at *de jure* barriers to entry, such as statutory or regulatory prohibitions against service by U.S. providers. These could include absolute or partial bars, as well as direct or indirect ones. For example, a foreign country could prohibit outright U.S. satellites from providing *any* home programming services by U.S. entities or could prohibit *any* indirect U.S. ownership. It also could prohibit video, but not audio services. By contrast, *de facto* barriers would constitute barriers that are not *per se* prohibitions, nor not necessarily formally adopted by the country's government, but that exist and, in practice, act as impediments to entry. For example, a country may permit U.S. entities to provide DTH service, but may impose more stringent technical or programming requirements or higher fees on U.S. providers than on its own providers. By discriminating against U.S. providers, any such *de facto* barriers would severely curtail, if not wholly eliminate, the ability of U.S. satellite entities to do business in the foreign market. As a result, the companies in the home market of the foreign-licensed satellite would be able to serve a market closed, in whole or in part, to U.S. companies. Denying competitive opportunities to U.S. entities in the foreign market, while allowing them for the country's own companies, would give the foreign-licensed satellite a competitive advantage over U.S. entities, causing competitive distortions.

100. Furthermore, we find that Hughes's proposed modified ECO-Sat test does not adequately address our concern that *any* artificial entry barriers foreign administrations place on traffic to or from the United States, even those not arising to the level of "significant protectionist barriers," could distort competition in the United States.

101. We disagree with the European Commission that these services are broadcasting services. The Commission has specifically concluded that it will not regulate DTH and DBS as broadcasting services.¹⁷⁵ Rather, the Commission regulates these services as basic telecommunications services. As such, the U.S. exclusion of these services from market access commitments and the MFN exemption taken during the WTO basic telecommunications negotiations are valid. Therefore, applying the ECO-Sat test to non-WTO covered services is fully consistent with our GATS obligations. With respect to Deutsche Telekom's concern about applications to provide both WTO-covered and non-WTO covered

¹⁷⁴ As discussed below, we will not apply the ECO-Sat test to requests to provide these services by entities licensed by nations with which we have bilateral agreements. See Section III.B.1.e.

¹⁷⁵ *In the Matter of Subscription Video*, 2 FCC Rcd 1001, *aff'd* 849 F.2d 665 (1988).

services over a non-U.S. satellite,¹⁷⁶ we clarify that we will address such requests separately, under the rules we adopt for each situation.

d. Intergovernmental Satellite Organizations and Their Affiliates

(1) Introduction

Background

102. In the *Notice* and *Further Notice*, the Commission addressed issues relating to opening the U.S. domestic satellite market to INTELSAT and Inmarsat, and their affiliates.¹⁷⁷ INTELSAT and Inmarsat are treaty-based, intergovernmental organizations (IGOs) designed to ensure world-wide satellite communications.¹⁷⁸ These organizations have certain privileges and immunities that provide them competitive advantages over competing satellite providers. For example, they are immune to suits in court (with limited exceptions for commercial contracts), including jurisdictional, discovery and asset immunity from antitrust laws. They also enjoy tax-free status. For example, they are exempt from income, corporate and property taxes, and customs and other duties in the host countries and other member states. Their size and the fact that their members are the primary, if not exclusive, providers of fixed and mobile maritime services in most major markets gives them a special, and possibly dominant, position in the global market. Further, COMSAT, by virtue of the Communications Satellite Act of 1962¹⁷⁹ and the 1978 International Maritime Satellite Telecommunications Act,¹⁸⁰ is the U.S. signatory to the IGOs. COMSAT provides INTELSAT and Inmarsat space segment capacity to users in the United States. COMSAT pays taxes, but as we discuss below, indirectly benefits from IGO immunity from suit, including suit based on U.S. antitrust laws.

¹⁷⁶ Deutsche Telekom FNPRM Reply Comments at 4. Teledesic withdraws its proposal in comments and reply comments in the *Notice* that the Commission establish a fourth service category called the "Interactive Broadband Satellite Services" and apply a critical mass test for this category. It now contends that there are likely to be so many competing IBSS providers from so many countries that the Commission need not worry about competitive distortions in the U.S. market. Teledesic FNPRM Comments at 5-6.

¹⁷⁷ *Notice* at ¶¶ 62-74; *Further Notice* at ¶¶ 31-36.

¹⁷⁸ *Notice* at ¶¶ 62-64. The International Telecommunications Satellite Organization (INTELSAT) operates a global system that provides fixed satellite service for voice, data, video and audio communications. See Agreement Relating to the International Telecommunications Satellite Organization, Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. The International Mobile Satellite Organization (Inmarsat), which provides global maritime and aeronautical mobile satellite communications services, has for several years been in the process of amending its Agreement in order to provide land mobile satellite services. See Convention on the International Maritime Satellite Organization, Sept. 3, 1976, reprinted Inmarsat Basic Documents (4th Ed. 1989).

¹⁷⁹ 47 U.S.C. §§ 701-744 (Satellite Act).

¹⁸⁰ 47 U.S.C. §§ 751-757 (Maritime Act).

103. In the *Notice*, the Commission asked whether, and under what conditions, it should permit INTELSAT and Inmarsat to serve the U.S. market, recognizing that home market and route market analyses would be analytically difficult to apply with respect to applications from these entities.¹⁸¹ In the *Further Notice*, the Commission asked whether the WTO Basic Telecom Agreement will result in a critical mass of open markets among IGO member countries that is sufficient to presume that the Commission can rely on competitive market forces and forego an ECO-Sat analysis.¹⁸² The Commission also proposed to treat IGO affiliates as it would treat any other non-U.S. satellite system. That is, the Commission would not apply an ECO-Sat test if the IGO affiliate is a satellite system licensed by a WTO Member and providing covered services.

Position of the Parties

104. Several commenters argue initially that we should not address access to the U.S. market by INTELSAT, Inmarsat, or IGO affiliates in this proceeding, and that instead we must establish a new proceeding in which to do so.¹⁸³ GE Americom points out that there is no need to complete consideration of entry questions involving IGOs prior to January 1, 1998, when the WTO Basic Telecom Agreement goes into force, because IGOs do not derive benefits from the Agreement.¹⁸⁴

105. Orion, for example, argues that a new proceeding is necessary because IGOs present significant and complex factual and legal issues that have not been sufficiently aired.¹⁸⁵ These commenters also assert that a new proceeding is particularly appropriate to address access by IGO affiliates, given pending proposals for restructuring and privatization.¹⁸⁶ Loral contends that a new proceeding regarding the affiliates would examine questions relating to: the proper level of ownership by IGOs, signatories and predecessors; which IGO assets and how many may be transferred without unduly disadvantaging

¹⁸¹ *Notice* at ¶¶ 64-65. We noted, in particular, that 136 countries are members of INTELSAT and 78 are members of Inmarsat. *Id.* In addition, both of these organizations provide global services. INTELSAT membership has grown to 141 countries and Inmarsat to 80.

¹⁸² *Further Notice* at ¶ 33.

¹⁸³ *See, e.g.*, GE Americom NPRM Reply Comments at 17; GE Americom FNPRM Comments at 6-7; GE Americom FNPRM Reply Comments at 6-7; Orion NPRM Comments at 13; Orion FNPRM Comments at 8; Orion FNPRM Reply Comments at 8-9; Columbia FNPRM Reply Comments at 2; Loral FNPRM Comments at 10 (do not address access involving IGO affiliates); PanAmSat FNPRM Reply Comments at 5-6.

¹⁸⁴ GE Americom FNPRM Comments at 6.

¹⁸⁵ Orion FNPRM Comments at 8-9; Orion FNPRM Reply Comments at 8-9.

¹⁸⁶ GE Americom FNPRM Comments at 17; Loral FNPRM Comments at 10-11; PanAmSat FNPRM Reply Comments at 6.

competition; what level of government financing of an IGO affiliate is anticompetitive; and what opportunities for cross-subsidization and non-arm's length transactions exist in the IGO affiliate context and what steps need to be taken to prevent each.¹⁸⁷

106. COMSAT, in contrast, opposes a new proceeding, noting that this rulemaking was established to address entry by non-U.S. satellites into the U.S. market, including IGOs and their affiliates.¹⁸⁸ COMSAT notes that the *Further Notice* specifically asked for comment related to the IGOs and their affiliates.¹⁸⁹ ICO objects to inclusion of ICO in any future proceeding, arguing that it should be treated like satellites from other WTO Members and that any such proceeding should address only future IGO affiliates.¹⁹⁰

Discussion

107. We find that a new proceeding is not needed -- neither for the IGOs nor IGO affiliates -- because we are only setting a framework for entry here. The *Notice* and *Further Notice* specifically addressed the unique competitive concerns relevant to entry by IGOs and IGO affiliates, and specifically requested comment on the standard to be applied for access to these satellite systems. We recognize that issues related to restructuring or privatization of INTELSAT and Inmarsat currently are the subject of international negotiations¹⁹¹ and that the issue of ICO independence from Inmarsat is currently before this Commission.¹⁹² Any specific concerns about whether, and to what extent, entry by a particular IGO or IGO affiliate would be anticompetitive are more appropriate in the context of a specific license application. As discussed below, the outcome of pending proceedings could be taken into account in conducting a public interest determination regarding a particular application. We therefore conclude that a separate proceeding is unnecessary and turn to the substantive issues of what entry test to apply to IGOs and IGO affiliates.

¹⁸⁷ Loral FNPRM Comments at 11-12.

¹⁸⁸ COMSAT FNPRM Reply Comments at 9-10.

¹⁸⁹ *Id.*

¹⁹⁰ ICO FNPRM Reply Comments at 10-11.

¹⁹¹ The Commission is committed to seeking substantial reform of the IGOs. The United States has taken a lead role on these issues. INTELSAT is considering the creation of an affiliate, possibly in 1998, to provide DTH, video and multimedia services. Inmarsat is considering full privatization of its commercial and operational arm, possibly in 1998, with a residual, scaled back IGO remaining to maintain its commitment to observe public service obligations, such as provision of maritime distress and safety services.

¹⁹² See Application of COMSAT for Authority to Participate in the Procurement of Facilities of the I-CO Global Communications Limited System (File No. 106-SAT-MISC-95) (filed May 1, 1995).

(2) Intergovernmental Satellite Organizations

Background

108. In the *Notice*, the Commission noted that IGOs present certain analytical issues within the framework it was proposing to apply to non-U.S. satellites. First, IGOs have no single home market, unlike private satellite operators, which are incorporated in and licensed by an individual country. Second, the Commission recognized that because IGOs were created to provide ubiquitous service and serve virtually every country from the United States, it may be difficult to apply a route market analysis to an application involving an IGO.¹⁹³ The Commission proposed several alternative standards for deciding whether earth stations could access an IGO satellite for the provision of U.S. *domestic* service:

- (1) The degree of openness of all various route markets served by the IGO (or at least all the markets of the IGO's members);¹⁹⁴
- (2) The degree of openness of the number of countries constituting the minimum level of concurrence required for any official act of an IGO;¹⁹⁵ or
- (3) A determination of whether the IGO, as result of its intergovernmental status and global dominance, would be in a position to diminish effective competition in the United States.¹⁹⁶

109. As to provision of *international* service involving the United States, the Commission tentatively concluded that it would not be in the public interest to apply the ECO-Sat test.¹⁹⁷ The Commission reasoned that there are still many nations in the world that are connected to the United States only by satellite, and any policy that makes it more difficult to reach these points would unduly constrain the already limited service to them. The Commission also stated that such an approach might be inconsistent with the statutes governing U.S. participation in INTELSAT and Inmarsat and established U.S. policy for use of those systems for certain international services.¹⁹⁸ As a result, the Commission proposed to

¹⁹³ *Notice* at ¶¶ 64-65.

¹⁹⁴ *Id.* at ¶ 66.

¹⁹⁵ *Id.* at ¶ 67.

¹⁹⁶ *Id.* at ¶ 68.

¹⁹⁷ *Id.* at ¶ 70.

¹⁹⁸ *Notice* at ¶¶ 69-70. See 47 U.S.C. § 753(c)(3)(A).

continue licensing *international* communications over INTELSAT and Inmarsat without applying an ECO-Sat test.

110. In the *Further Notice*, the Commission revisited these proposals in light of the successful conclusion of the WTO Basic Telecom Agreement. Initially, the Commission noted that because IGOs are intergovernmental treaty organizations, they do not benefit from that Agreement, which covers only services or service suppliers of WTO Members. Consequently, the Commission noted that the United States owes no market access, national treatment or MFN obligations to the IGOs.¹⁹⁹

111. The Commission asked, however, whether the commitments made under the WTO Basic Telecom Agreement constitute a critical mass of open satellite markets sufficient to presume that allowing entry by IGOs for provision of U.S. *domestic* service would enhance competition in the United States.²⁰⁰ In that regard, the Commission noted that 51 of the 141 INTELSAT members made full or partial market access commitments in basic telecom services under the WTO; these 51 members, including the United States, own 80% of the shares of INTELSAT. In addition, 49 of the 80 Inmarsat members made commitments on basic telecommunications services. All 30 countries that made market access commitments for mobile satellite services in the WTO Basic Telecom Agreement are Inmarsat members.²⁰¹

Position of the Parties

112. Space Communications, Motorola, and PanAmSat support applying some form of ECO-Sat test to all or particular IGOs seeking entry to provide *domestic* service in the United States.²⁰² PanAmSat strongly opposes allowing U.S. earth stations to use INTELSAT capacity for the provision of U.S. domestic services because of enormous competitive advantages the IGOs derive from their privileges and immunities.²⁰³ Some parties assert that IGOs are not covered by the WTO Basic Telecom Agreement,²⁰⁴ while PanAmSat specifically claims that IGOs should not be treated as if they were WTO satellites because access by the

¹⁹⁹ *Further Notice* at ¶ 32.

²⁰⁰ *Id.* at ¶ 33.

²⁰¹ *Id.* at ¶ 32.

²⁰² AMSC NPRM Comments at 5; Space Communications NPRM Comments at 8; PanAmSat NPRM Comments at 5; Motorola NPRM Comments at 41-44.

²⁰³ PanAmSat FNPRM Comments at 6.

²⁰⁴ *See, e.g.*, AMSC FNPRM Reply Comments at 10; Lockheed Martin FNPRM Comments at 7; Orion NPRM Reply Comments at 7-8.

IGOs was discussed in detail during the WTO basic telecommunications negotiations and rejected by the negotiators.²⁰⁵

113. Other commenters recommend that we not impose an ECO-Sat test either on IGOs in general or with regard to specific IGO services. INTELSAT asserts that the ECO-Sat test is ineffective when applied to IGOs, because IGOs have no control over the domestic policies of its sovereign members.²⁰⁶ Furthermore, INTELSAT and COMSAT argue that a test imposed on IGOs does not motivate foreign countries to open their markets to U.S. satellite systems, as many countries do not seek access to the U.S. market.²⁰⁷ BTNA claims that it is unnecessary to subject traditional Inmarsat domestic services to a competitive entry test while COMSAT contends that no test is necessary for INTELSAT or Inmarsat.²⁰⁸ Lockheed Martin proposes that the core treaty-based services offered by INTELSAT and Inmarsat not be subject to any ECO-Sat analysis and instead continue to be authorized in the same manner as they have been in the past.²⁰⁹ COMSAT also argues in the alternative that the Commission should apply the same treatment to provision of service using INTELSAT and Inmarsat satellites as the Commission proposes for satellites licensed by WTO Members.²¹⁰

114. The Networks argue that an ECO-Sat test should not be applied to transmission of video services using INTELSAT because of a shortage of capacity.²¹¹ In response, Columbia states that the networks have not made a sufficient case for special treatment of video services. It notes that shortage of capacity can be a factor considered in application of the ECO-Sat test and, where there are no other options, override the absence of effective

²⁰⁵ PanAmSat FNPRM Reply Comments at 6-7; AMSC FNPRM Reply Comments at 10.

²⁰⁶ INTELSAT NPRM Comments at 9.

²⁰⁷ INTELSAT NPRM Reply Comments at 4; COMSAT NPRM Reply Comments at 17; COMSAT NPRM Comments at 20-23. COMSAT also argues that there is no evidence in the record to suggest that provision of domestic services by COMSAT would have anticompetitive effects. COMSAT NPRM Comments at 12-20. This argument, however, does not go to whether an entry test is necessary but whether the analysis under any such test has been satisfied.

²⁰⁸ BTNA FNPRM Comments at 2; COMSAT FNPRM Comments at 13.

²⁰⁹ Lockheed Martin FNPRM Comments at 7. Inmarsat's core services are international maritime distress and safety services.

²¹⁰ COMSAT FNPRM Comments at 9-12; COMSAT FNPRM Reply Comments at 10-12.

²¹¹ Networks FNPRM Comments at 8 -9. In the alternative, the networks argue that the Commission should grandfather existing services provided by INTELSAT or should determine that the critical mass test has been met. *Id.*

competitive opportunities.²¹² GE Americom disagrees that there is a shortage of capacity, noting the recent launching of a new GE Americom satellite.²¹³

115. Deutsche Telekom objects to a route market analysis because it would allow the Commission to deny entry if only one of the IGO's route markets is not open.²¹⁴ In addition, Deutsche Telekom notes that the route market analysis ignores the fact that many IGO member countries made satellite commitments as a result of the WTO basic telecommunications negotiations.²¹⁵ In contrast, Space Communications suggests that the route market analysis would be effective in ensuring INTELSAT does not discriminate in various route markets.²¹⁶

116. With respect to our critical mass proposal, Deutsche Telekom and OrbComm suggest that the critical mass test would not be appropriate because of the difficulty of determining what number of countries constitute a critical mass.²¹⁷ The Networks and COMSAT argue that a critical mass of markets has been reached as a result of the WTO basic telecommunications commitments.²¹⁸ In contrast, PanAmSat argues that a critical mass has *not* been reached. It further argues that a critical mass test would allow INTELSAT to discriminate in markets in which it has market power and to cross-subsidize its service offerings in markets in which it does not.²¹⁹ Space Communications agrees that the critical mass test would enable INTELSAT to discriminate in many markets.²²⁰ AT&T argues that the Commission should examine the openness of all the various route markets served by the IGO.²²¹ ORBCOMM believes that the Commission should use a combination of both the critical mass test and the effect on competition to determine whether IGO entry is appropriate.

²¹² Columbia FNPRM Reply Comments at 4-5.

²¹³ GE Americom FNPRM Reply Comments at 8.

²¹⁴ Deutsche Telekom FNPRM Reply Comments at 9.

²¹⁵ *Id.*

²¹⁶ Space Communications FNPRM Reply Comments at 7-8.

²¹⁷ Deutsche Telekom FNPRM Reply Comments at 9; OrbComm NPRM Comments at 4-6.

²¹⁸ COMSAT FNPRM Comments at 14; Networks FNPRM Reply Comments at 8.

²¹⁹ PanAmSat FNPRM Comments at 6-7.

²²⁰ Space Communications FNPRM Reply Comments at 7-8.

²²¹ AT&T NPRM Comments at 16.

The critical mass analysis would be the initial hurdle, which, if passed, would be followed by an analysis of the effect on competition.²²²

117. Some commenters support the Commission's proposal to evaluate service over an IGO satellite on the basis of whether the service would diminish effective competition in the U.S. market for satellite services.²²³ COMSAT states that, if an entry test is necessary, it should be limited to determining whether the proposed service would diminish effective competition in the United States.²²⁴ Loral disapproves of such a test because it represents no improvement from a critical mass test and does not create incentives to open markets.²²⁵ Lockheed Martin, however, favors a test involving whether the entrance of an IGO provides additional market advantages to an entity that has the ability to distort competition.²²⁶ OrbComm supports a combination of the effect on competition and critical mass approaches.²²⁷ AMSC urges the Commission to examine carefully the impact that IGO access to the United States has on the international frequency coordination process and the ability of regional and domestic systems to compete.²²⁸ GE Americom suggests the Commission adopt the proposals in legislation currently pending before Congress.²²⁹

Discussion

118. As an initial matter, we find unpersuasive suggestions that no standard for review should be established for IGOs until a final decision is made concerning their

²²² OrbComm NPRM Comments at 4-5.

²²³ Motorola FNPRM Comments at 6; INTELSAT NPRM Comments at 7; KDD NPRM Comments at 3. A number of commenters suggest that if an effect on competition test were applied to IGOs, the test would be met, noting that limited Intelsat capacity is available for domestic services. See INTELSAT NPRM Reply Comments at 5-7; COMSAT NPRM Reply Comments at 22; CC/Networks NPRM Reply Comments at 8-9; HBO NPRM Comments at 20. In this *Report and Order*, we are establishing the test that a service provider wishing to access an IGO must meet, not whether that test has been met. Thus, these comments are not relevant to the proposals at issue in the current proceeding.

²²⁴ COMSAT FNPRM Comments at 13.

²²⁵ Loral NPRM Reply Comments at 8.

²²⁶ Lockheed Martin NPRM Reply Comments at 15.

²²⁷ OrbComm NPRM Comments at 4-6.

²²⁸ AMSC NPRM Comments at 5.

²²⁹ GE Americom FNPRM Comments at 7. See "Communications Satellite Competition and Privatization Act of 1997," H.R. 1872, 105th Cong., 1st Sess. (1997).

privatization.²³⁰ We are not ruling on applications to provide domestic service in this *Report and Order*. Rather, we are establishing the standard that we will use to judge license applications when we receive them. We share the concerns expressed by many commenters about the special advantages accorded IGOs as a result of their treaty-based status. The test that we establish today is designed to take those special advantages into account in determining whether service may be provided through an IGO in the U.S. domestic market. Since COMSAT is currently the sole provider of INTELSAT and Inmarsat capacity in the United States and the U.S. has no obligation to allow access under the WTO Basic Telecom Agreement, the entry standard we set out is limited to applications from COMSAT.

119. We reaffirm our conclusion that we have no WTO obligation to allow the IGOs access to the U.S. market. As an organization created by treaty, an IGO is not a service supplier of a WTO Member and therefore does not derive any benefits from the WTO Basic Telecom Agreement. Thus, we find no merit in COMSAT's argument that we should treat IGOs as if they were service suppliers of a WTO Member.²³¹ As PanAmSat, AMSC and Orion correctly point out, participants in the WTO basic telecommunications negotiations were unanimous that IGOs were not service suppliers of a WTO Member.²³² Therefore, we agree with AMSC that we have no obligation under the WTO Basic Telecom Agreement to treat IGOs as if they were licensed by WTO Members.²³³

120. We find unconvincing BTNA's argument that the United States has an obligation to provide WTO Member companies direct access to Inmarsat.²³⁴ This argument is premised on BTNA's incorrect conclusion that the U.S. Schedule of Specific Commitments only limits access to INTELSAT and Inmarsat with respect to international service and not U.S. domestic service.²³⁵ The U.S. Schedule of Specific Commitments makes no such distinction; rather it maintains access to INTELSAT and Inmarsat satellites through COMSAT for the provision of *any* service, domestic or international.

121. Although we are free to apply an ECO-Sat test to IGO provision of *domestic* services, we agree with Columbia that there is no reasonable means of applying such a test to

²³⁰ See Columbia NPRM Comments at 22; GE Americom NPRM Comments at 11; Orion NPRM Comments at 15; AT&T NPRM Comments at 14; Lockheed Martin NPRM Reply Comments at 16.

²³¹ COMSAT FNPRM Comments at 9.

²³² PanAmSat FNPRM Reply Comments at 6; AMSC FNPRM Reply Comments at 10; Orion FNPRM Comments at 7.

²³³ AMSC FNPRM Reply Comments at 10.

²³⁴ BTNA FNPRM Comments at 3. See also Government of Japan FNPRM Comments at 3.

²³⁵ BTNA FNPRM Comments at 3, n.5. See also COMSAT FNPRM Reply Comments at 12.

IGOs. We confirm the conclusion in the *Notice* that the IGOs have no home market.²³⁶ As we stated in the *Notice*, INTELSAT and Inmarsat are headquartered in the United States and United Kingdom, respectively, and the United States and United Kingdom forward these organizations' space station information to the ITU for registration and coordination purposes. However, the highest authority in each organization is national governments. It is unrealistic to treat the United States or the United Kingdom, respectively, as the home market, or to treat any single nation as the home market.²³⁷

122. We conclude that a route market²³⁸ test will not achieve our objective of promoting competition in the United States or opening foreign satellite markets. In the *Notice*, one of the alternative approaches that the Commission proposed to look at was the openness of all the various route markets served by an IGO -- or at least the markets of its Signatories.²³⁹ This would require us to evaluate whether all of an IGO's Signatories allow U.S. satellite systems to provide domestic services in the Signatories' markets prior to granting COMSAT authority to provide domestic service via that IGO. We find that this sets an unnaturally high barrier because the existence of market barriers in a small number of countries would preclude approval of COMSAT's application. It also does not make sense because many of the smaller Signatories may not have policies in place or a need to establish policies to regulate domestic satellite services.

123. We also conclude that a critical mass test is not appropriate. As we noted in our discussion of critical mass in relation to non-WTO satellite systems,²⁴⁰ there is the question of what constitutes critical mass and whether it has been reached.²⁴¹ Furthermore, the existence of a critical mass depends on the market plans of individual satellite systems and cannot devise a critical mass test that would uniformly apply to all satellite services. Even if we were able to determine what constituted a critical mass, as PanAmSat notes, a critical mass test would not prevent an IGO from engaging in cross-subsidization or otherwise taking advantage of its special status. In addition, we are concerned that applying the critical mass test would not encourage the opening of foreign markets to U.S. satellite services. A

²³⁶ *Notice* at ¶ 65.

²³⁷ *Id.*

²³⁸ The use of the term "route" market in the IGO context is a misnomer. In effect, the Commission proposed to apply a "home" market test looking at whether IGO Signatories allow U.S. satellite systems to provide domestic satellite services.

²³⁹ *Notice* at ¶ 66.

²⁴⁰ *See supra* Section III.B.1.b.3.

²⁴¹ *Compare* COMSAT FNPRM Comments at 13-14, n.19 and Networks FNPRM Comments at 8 (both arguing that a critical mass had already been achieved) with PanAmSat FNPRM Comments at 6-7 (arguing that critical mass approach is inadequate).

"critical mass" concept implies that all countries need not open their markets. Allowing countries with closed markets to serve the United States because a critical mass of open markets in other countries has been achieved, would provide no incentives for the closed market to open.

124. The fact that there is no appropriate way of applying an ECO-Sat test to IGOs does not mean that we will allow IGOs free access to the U.S. domestic market. We conclude that we will adopt the third alternative proposed in the *Notice* -- an examination of the competitive effect of IGO entry.

125. We agree with Columbia that IGOs have unique characteristics as treaty-based organizations that could enable them to distort competition.²⁴² Among these characteristics is the immunity INTELSAT and Inmarsat enjoy from suit, including suit under the U.S. antitrust laws. COMSAT, in its role as the U.S. Signatory to INTELSAT and Inmarsat, also benefits from these immunities. We conclude that INTELSAT, Inmarsat, and COMSAT should be subject to the *same rules as their competitors* before COMSAT will be allowed to provide domestic service via INTELSAT or Inmarsat. COMSAT states that it has never claimed immunity as a common carrier and argues that it would enjoy no special advantages over other providers of satellite services in the United States.²⁴³ These arguments, however, overlook the benefits that COMSAT derives in its signatory capacity from the IGOs' immunities. In that capacity, COMSAT participates in business and commercial decisions protected by this immunity.²⁴⁴ The courts have held that COMSAT, acting in its capacity as U.S. Signatory to INTELSAT and Inmarsat, has immunity from liability under the U.S. antitrust laws.²⁴⁵ We find that this extension of immunity provides COMSAT a competitive

²⁴² Columbia FNPRM Comments at 2.

²⁴³ COMSAT FNPRM Reply Comments at 13.

²⁴⁴ COMSAT is a member of the INTELSAT Board of Governors and Inmarsat Council and participates in decisions on rates, services, financing, purchase of satellites, development of business plans and other matters normally related to the commercial operation of a satellite system. These decisions provide the basis upon which COMSAT offers service for U.S. customers. These decisions are also made by COMSAT's competitors, but by contrast they are subject to U.S. antitrust laws governing such activities. COMSAT is subject to instruction and guidance from the U.S. Government in its role as U.S. signatory to INTELSAT and Inmarsat. U.S. Government instructions are issued on limited topics involving public policy and national interest issues and normally do not involve purely commercial matters.

²⁴⁵ See *AlphaLyracom Space Communications, Inc. v. Communications Satellite Corp. (COMSAT)*, 1990 WL 135637 at 6-7 (S.D.N.Y. 1990), *aff'd* in part and *rev'd* in part, *AlphaLyracom v. COMSAT*, 946 F.2d 168 (2d Cir. 1991); cert. denied, *AlphaLyracom v. COMSAT*, 502 U.S. 1096 (1992). See also *AlphaLyracom Space Communications, Inc. v. COMSAT*, 1996 WL 897666 (S.D.N.Y.), *aff'd*, *AlphaLyracom v. COMSAT*, 113 F.3rd 372 (2d Cir. 1997). See also, *See-Fone, Limited v. Communications Satellite Corporation*, U.S. Court of Appeals for the Fourth Circuit, No. 96-1672 (unpublished decision, July 8, 1997).

advantage.²⁴⁶ It allows commercial decisions and activities to be conducted under a cloak of immunity unavailable to COMSAT's competitors. Because of concern over potential harm to the U.S. market for satellite services, we conclude that this is not a situation that we are willing to extend to the U.S. domestic satellite market.

126. As a result, we will require COMSAT to make an appropriate waiver of immunity from any suit as part of its application to provide *domestic* services via INTELSAT or Inmarsat.²⁴⁷ If COMSAT makes an appropriate waiver,²⁴⁸ we will look to COMSAT to show that entry into the United States *domestic* market by an INTELSAT or Inmarsat satellite would promote competition and is otherwise in the public interest. Prospective circumstances that could give rise to competition concerns include market concentration, discrimination, and below average variable cost pricing. If there is no other way to address the competitive risks, we may deny the application. If there is a shortage of video transmission capacity, as the Networks argue, we would take this into account in considering whether access to INTELSAT or Inmarsat would distort competition in the U.S. market.

127. We adopt the tentative conclusion in the *Notice* that we will evaluate access requests involving *international* communications over INTELSAT and Inmarsat without applying the ECO-Sat test.²⁴⁹ Instead, we will treat applications from COMSAT to provide international services via INTELSAT or Inmarsat on a case-by-case basis as we have done in the past. In ruling on these applications, we are fully prepared to address questions about foreign market access or competition issues in the course of an application proceeding.²⁵⁰ Use of these satellite systems for *international* services is provided for under the Satellite Act, the Maritime Act, and previous Commission authorizations, and is well-established as a matter of practice. As stated in the *Notice*, there are many nations in the world that are connected to the United States only by satellite, and any policy that makes it more difficult to reach these points over INTELSAT would unduly constrain the already limited service to these points. Similarly, Inmarsat remains the only two-way satellite communications system recognized

²⁴⁶ See United States Government Accounting Office, *Report to the Chairman, Committee on Commerce, House of Representatives, Competitive Impact of Restructuring the International Satellite Organizations*, GAO/RCED-97-1 (Oct. 1996), at 33-4, stating that "immunity from lawsuits may allow the organizations [INTELSAT and Inmarsat] to act in the market in ways that competitors cannot under U.S. antitrust laws."

²⁴⁷ See *Merger of MCI Communications Corp. and British Telecommunications plc*, FCC 97-302 at 41, n. 135 and at 125 (rel. Sept. 24, 1997).

²⁴⁸ In order to ensure COMSAT's ability to carry out its signatory responsibilities, we recognize that COMSAT's immunity should be retained when it is carrying out instructions from the U.S. Government.

²⁴⁹ *Notice* at ¶ 70.

²⁵⁰ See pending COMSAT applications: 1) Application (I-SAT-P-97) for authority to participate in INTELSAT K-TV program; 2) application (CSS-93-009-(1)-A) to participate in INTELSAT program to construct INTELSAT 805 and 806 satellites.

today by the International Maritime Organization as a Global Maritime Distress and Safety System provider, and we believe international services over Inmarsat should remain robust until global maritime and distress and safety services are provided by multiple private systems. For both domestic and international services applications, we will also consider spectrum and other appropriate considerations discussed in Section III.B.2-5.²⁵¹

128. We also conclude that we will not apply an ECO-Sat test to other IGOs, such as Eutelsat or Palapsat, that seek to serve the U.S. market, either for domestic or international services. We agree with Lockheed Martin that the competitive concerns related to INTELSAT and Inmarsat do not apply to these smaller satellite organizations.²⁵² These entities do not have the same global coverage, market power or breadth of membership as INTELSAT and Inmarsat. As a result, we will presume that entry by these entities is procompetitive. If grant would pose a risk to competition (either through the existence of immunities or other conditions) in the U.S. satellite market, we may impose conditions on the authorization. If conditions would not suffice, we may deny the application.

(3) IGO Affiliates

Background

129. In the *Notice*, the Commission acknowledged that the IGOs were studying various proposals to streamline their organizations to enable them to respond better and faster to competitive pressures.²⁵³ The Commission noted that if the IGOs are to provide services in competitive markets, they cannot be permitted to leverage the benefits of their intergovernmental status to distort competition unfairly. The Commission also recognized that any IGO affiliate may be able to take advantage of these privileges if it were not truly independent. For these reasons, the Commission asked whether affiliates of IGOs should be treated as inter-governmental or private entities.²⁵⁴

130. In addition, the Commission proposed to treat IGO affiliate satellites like any other non-U.S. satellite seeking access to the U.S. market, although the Commission proposed to scrutinize, as part of the public interest analysis, the affiliate's independence from any IGO or its Signatories. Thus, in the *Notice*, the Commission proposed to apply an ECO-Sat test, as well as other public interest factors. The Commission stated that any views expressed by

²⁵¹ AMSC urged us to consider the impact that IGO access has on the international frequency coordination process. AMSC NPRM Comments at 5. As we discuss below, spectrum availability and frequency coordination are always considered in our licensing process. The standard for entry will not eliminate these considerations.

²⁵² Lockheed Martin FNPRM Comments at 8.

²⁵³ *Notice* at ¶¶ 71-74.

²⁵⁴ *Id.* at ¶ 64.

the Executive Branch regarding the extent to which the affiliate's structure is consistent with U.S. policy would be a prominent part of the analysis.²⁵⁵ Finally, the Commission proposed to apply this standard of review to any request to transfer existing IGO licenses to an affiliate and to new services via an affiliate.²⁵⁶

131. In light of the WTO Basic Telecom Agreement, in the *Further Notice*, the Commission proposed that IGO affiliate satellites from WTO Members would be accorded the same treatment as any satellite system of a WTO Member.²⁵⁷ Therefore, the Commission proposed not to apply an ECO-Sat test to IGO affiliate satellites licensed by a WTO Member.²⁵⁸ The Commission reiterated its concern, however, that the unique relationship between an IGO and its affiliate could pose a very high risk to competition in satellite services to, from and within the United States. The Commission noted that in the WTO Basic Telecom Agreement, the United States had preserved its ability to protect competition in the U.S. market, including the possibility of not granting market access to a future IGO affiliate satellite.²⁵⁹ In support of this position, the Commission cited the U.S. Trade Representative's statement that the United States has no obligation to permit market access to a future privatized affiliate, subsidiary, or other IGO spinoff that would likely lead to anticompetitive results.²⁶⁰ As a result, the Commission proposed *not* to apply an ECO-Sat test to IGO affiliate satellites of WTO member countries, but to review the affiliate's relationship to its IGO parent to ensure that grant would not pose a very high risk to competition in the U.S. satellite market, through, for example, collusive behavior, cross-subsidization, denial of

²⁵⁵ *Id.* at ¶ 73.

²⁵⁶ *Id.* at ¶ 74.

²⁵⁷ *Further Notice* at ¶ 34.

²⁵⁸ *Id.* at ¶ 35.

²⁵⁹ *Id.*

²⁶⁰ *Id.* See Letter from Charlene Barshefsky, U.S. Trade Representative Designate to Ken Gross, President and Chief Operating Officer, Columbia Communications (Feb. 12, 1997) (USTR Letter), stating in part:

We have also concluded that the United States cannot be forced to grant a license to a privatized inter-governmental satellite organization (ISO) (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if [the WTO Basic Telecom Agreement] goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anticompetitive results.

market access, and directly or indirectly benefitting from IGO privileges and immunities.²⁶¹ Finally, the Commission noted that this test would apply to evaluation of requests to use satellites of future IGO affiliates.

Position of the Parties

132. A number of commenters agree that IGO affiliate satellites should be treated the same as other non-U.S. satellites.²⁶² USTR states that application of the ECO-SAT test should be governed by whether the licensing authority is a WTO Member.²⁶³ Deutsche Telekom argues that the Commission has to grant the same rights and privileges to IGO affiliates licensed by WTO Members as it does to other satellite systems licensed by WTO Members.²⁶⁴ COMSAT states that the competitive review envisioned for all non-U.S. satellites should be sufficient to detect any affiliate relationships or structures that pose a risk to competition.²⁶⁵ It argues that any further inquiry would set a bad precedent for other countries.²⁶⁶ Lockheed Martin agrees, stating that the Commission would need to consider any potential anticompetitive or market distorting consequences of a continued relationship between an IGO and its affiliate.²⁶⁷ France Telecom states that if an entry test is necessary, any conditions should be narrowly crafted so as to avoid hampering the ability of the affiliate to compete fairly and effectively. Furthermore, direct or indirect government ownership of an IGO affiliate should not prevent it from obtaining a license.²⁶⁸

²⁶¹ *Further Notice* at ¶ 36.

²⁶² Lockheed Martin FNPRM Comments at 8; Deutsche Telekom FNPRM Reply Comments at 10; COMSAT FNPRM Comments at 19; European Commission FNPRM Reply Comments at 4.

²⁶³ USTR FNPRM Reply Comments at 6-7.

²⁶⁴ Deutsche Telekom FNPRM Reply Comments at 10. Loral stated that IGO affiliates were not entitled to benefit under the WTO agreement. Loral FNPRM Comments at 12. This statement is inaccurate. If an IGO affiliate is a "service supplier" of a WTO Member, it is entitled to the benefits of the WTO Basic Telecom Agreement.

²⁶⁵ COMSAT FNPRM Reply Comments at 17.

²⁶⁶ COMSAT FNPRM Comments at 19-20.

²⁶⁷ Lockheed Martin FNPRM Comments at 8.

²⁶⁸ France Telecom FNPRM Reply Comments at 4.

133. Others argue that IGO affiliate satellites should be subject to more rigorous scrutiny than other satellite systems from WTO Members.²⁶⁹ Orion argues that the Commission must aggressively police IGO affiliate satellites to ensure that only *bona fide* independent affiliates are permitted into the U.S. market.²⁷⁰ Orion urges us to adopt a broad definition of affiliates, not limited to those entities under common ownership or control, and asks us to look at any preferential contractual arrangements between an IGO affiliate and IGO signatory administrations that would enable it to act in an anticompetitive manner.²⁷¹ PanAmSat notes that it is appropriate and necessary to inquire whether the affiliate could pose a significant risk to competition and whether the affiliate is structured to prevent practices such as collusive behavior, cross-subsidization and denial of market access.²⁷² Space Communications supports the Commission's decision to review the affiliate's relationship to its IGO parent and suggests that the Commission consider structural factors that could lead to collusive behavior, cross-subsidies and the denial of market access.²⁷³ TRW agrees with the Commission's assessment of the inherent risk to competition posed by IGO affiliates in the U.S. marketplace.²⁷⁴ Loral argues that, because of their ownership interest, IGO signatories will give IGO affiliates preferential treatment over other private systems. Loral also notes that IGO signatory ownership may make it easier for IGO affiliates to raise capital.²⁷⁵ Columbia argues that the streamlined WTO model should apply only to entities that have an entirely separate investment structure and no special treaty privileges. If any vestigial IGO entity remains, Columbia argues, the Commission should review those ties.²⁷⁶

134. A number of commenters cite the letter from U.S. Trade Representative Barshefsky, quoted above, for the proposition that we should closely scrutinize IGO affiliates.²⁷⁷ Indeed, Columbia contends that the letter supports the proposition that an IGO

²⁶⁹ TRW FNPRM Comments at 6; GE Americom FNPRM Comments at 6; PanAmSat FNPRM Comments at 7; Orion FNPRM Comments at 8; Columbia FNPRM Comments at 3; Space Communications FNPRM Comments at 9. *See also* Loral FNPRM Comments at 6 (although Loral urges the Commission to seek further comment to develop rules and standards under which an IGO affiliate may serve the U.S. market).

²⁷⁰ Orion FNPRM Comments at 11.

²⁷¹ *Id.* at note 21.

²⁷² PanAmSat FNPRM Comments at 7-8.

²⁷³ Space Communications FNPRM Reply Comments at 9.

²⁷⁴ TRW FNPRM Comments at 4.

²⁷⁵ Loral FNPRM Comments at 8.

²⁷⁶ Columbia FNPRM Comments at 3.

²⁷⁷ *See, e.g.*, Columbia FNPRM Comments at 4; Orion FNPRM Comments at 10-11.

affiliate has to be totally devoid of IGO ownership to qualify for entry.²⁷⁸ COMSAT argues that the USTR's letter does not establish a separate standard for IGO affiliates. Rather, according to COMSAT, the letter states that IGO affiliates will be treated the same as all other applicants -- and that this scrutiny should detect any anticompetitive relationships between the IGOs and their affiliates.²⁷⁹

135. Comments are divided as to whether ICO should be treated as an IGO affiliate, subject to greater scrutiny when it applies for a license, or as any other WTO satellite system.²⁸⁰ Some commenters see no rational basis for distinguishing between an existing and future IGO affiliate.²⁸¹ Hughes notes that ICO had not been considered as a future IGO affiliate during the basic telecom negotiations and should not be treated as one now.²⁸²

Discussion

136. We affirm the tentative conclusion in the *Further Notice* that we should treat IGO affiliate satellites²⁸³ licensed by WTO Members like other satellites licensed by WTO Members. Thus, for services covered by U.S. commitments under the WTO Basic Telecom Agreement,² we will apply the presumption in favor of entry to an IGO affiliate licensed by a WTO Member. We reserve the right, however, to attach conditions to the grant of authority or, in the exceptional case in which an application would pose a very high risk to competition in the U.S. satellite market, to deny the application. In determining whether an application to serve the U.S. market by an IGO affiliate raises the potential for competitive harm, we will consider any potential anticompetitive or market distorting consequences of continued relationships or connections between an IGO and its affiliate. For example, we will look at whether the affiliate is structured to prevent practices such as collusive behavior or cross-subsidization, the degree of affiliation between the IGO and its affiliate, and whether the affiliate can directly or indirectly benefit from IGO privileges and immunities. We will also consider the ownership structure of the affiliate, the effect of IGO and other Signatory ownership, and the existence of clearly defined arms-length conditions governing the affiliate-IGO relationship. We anticipate that arms-length conditions would include separate officers,

²⁷⁸ Columbia FNPRM Comments at 4.

²⁷⁹ COMSAT FNPRM Reply Comments at 17.

²⁸⁰ Loral FNPRM Comments at 13-17; TRW FNPRM Comments at 4-7; Hughes FNPRM Comments at 10, Reply Comments at 5-6; ICO NPRM Comments at 42-44, FNPRM Comments at 15-16, Reply Comments at 16; COMSAT FNPRM Comments at 19.

²⁸¹ TRW FNPRM Comments at 4; Loral FNPRM Comments at 14.

²⁸² Hughes FNPRM Reply Comments at 5-6.

²⁸³ For the purpose of this *Report and Order*, an IGO affiliate is an entity created by an IGO, in which an IGO and IGO signatories maintain ownership interests. ICO falls within our definition of an IGO affiliate.

directors, employees, and accounting systems, and fair market valuing for permissible business transactions between an IGO and its affiliate that is verifiable by an independent audit and consistent with normal commercial practice. There should be no common marketing or recourse to IGO assets for credit or capital. It is also essential that an IGO not register or coordinate spectrum or orbital locations on behalf of its affiliate.

137. We recognize that the creation of IGO affiliates will result from international negotiation among INTELSAT or Inmarsat members. Our competition review will reflect any arrangements agreed to by the United States as a result of such negotiations. As we stated in the *Notice*, due to the role of the Executive Branch in the negotiation of the creation of any IGO affiliate, we will take into account views expressed by the Executive Branch on the competitive nature of requests for IGO affiliate entry as part of our public interest analysis.

138. We will apply the ECO-Sat test as described above to IGO affiliate satellites from non-WTO countries. Similarly, we will treat an IGO affiliate's provision of DTH, DBS and DARS in the same manner as other non-U.S. satellites systems providing those services. IGO affiliates also will be subject to the same spectrum availability considerations, licensing, and operating requirements, and other public interest factors discussed below.

e. **Bilateral Agreements**

Background

139. In the *Further Notice*, the Commission recognized that to continue our goal of enhancing competition in the global satellite market, the United States may enter bilateral agreements with individual countries for the provision of satellite services.²⁸⁴ Indeed, the United States recently completed a bilateral agreement with Mexico for DTH-FSS and DBS service, services which are not covered under the WTO Basic Telecom Agreement.²⁸⁵ The Commission noted that it expects any such agreements to benefit U.S. operators by providing them with market access to a country on a national treatment basis.²⁸⁶

140. The Commission proposed to evaluate applications based on bilateral satellite services agreements in the same manner that we proposed to treat applications to access

²⁸⁴ *Further Notice* at ¶ 29.

²⁸⁵ Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 26, 1996. Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, November 8, 1996.

²⁸⁶ *Further Notice* at ¶ 29.

satellites licensed by WTO Members for the provision of covered services.²⁸⁷ Specifically, the Commission proposed not to apply the ECO-Sat test to these applications, but to evaluate such applications under a presumption that entry will promote competition unless an opposing party demonstrates a very high risk to competition in the United States satellite market that could not be addressed by conditions on the license. The Commission sought comment on this proposal.

Positions of the Parties

141. The commenters support our proposal.²⁸⁸ They claim that an ECO-Sat test would be "redundant" because the purpose of a bilateral agreement is to enhance competition by permitting foreign-licensed satellites to offer new services to U.S. consumers, and opening foreign markets to U.S.-licensed satellites.

142. Some parties make recommendations about how we should execute bilateral agreements. Orion suggests that we conduct bilaterals as expeditiously as possible and that we not halt service while negotiations are underway. It recommends that, rather than freezing earth station applications involving services under discussion, we grant special temporary authority for foreign systems to operate in the United States.²⁸⁹ GE Americom urges us to retain authority to monitor competitive conditions and compliance with the terms of a bilateral agreement, as well as the power to revoke or condition authorizations as necessary to address competitive concerns.²⁹⁰ PanAmSat suggests that, if a bilateral agreement governs two or more satellite services, the Commission should retain authority to deny access to operators

²⁸⁷ *Id.* at ¶ 30.

²⁸⁸ GE Americom FNPRM Comments at 4-5; GE Americom FNPRM Reply Comments at 2-3; Hughes FNPRM Comments at 15-16; Hughes FNPRM Reply Comments at 6-7; Orion FNPRM Comments at 7 n.13; PanAmSat FNPRM Comments at 8 n.16; Qualcomm FNPRM Comments at 6-7. In addition, the European Commission reiterates its position that DTH-FSS, DBS, and DARS effectively are covered under the WTO Agreement, and thus, should not be subject to an ECO-Sat test. European Commission FNPRM Reply Comments at 2-3. We note that despite our overall treatment of DTH-FSS, DBS, and DARS as non-covered WTO services, our treatment of those services in the context of bilateral agreements will achieve the result the European Commission seeks -- a presumption in favor of entry of enhanced competition, and no application of the ECO-Sat test.

²⁸⁹ Orion FNPRM Comments at 7. Orion claims, for example, that the Commission's freeze on earth station applications to communicate with the Mexican Telecom system during the six-month negotiation period between the United States and Mexico on an FSS protocol, affected the ability of Orion and other U.S. licensee to obtain licenses for services they wanted to provide via the Telecom system. *Id.*

²⁹⁰ GE Americom FNPRM Comments at 4-5.

licensed by the foreign country for all such services if U.S. licensees subsequently are denied access regarding the provision of any of the services covered under the bilateral agreement.²⁹¹

Discussion

143. We adopt our proposal to review applications to access a satellite licensed in a foreign country with which the United States has an existing bilateral agreement involving the particular type of satellite service to be provided based on a presumption that entry will promote competition. In such cases, the bilateral agreement would itself grant U.S. companies the right to enter a foreign country's market for that particular satellite service market and affords various other rights and protections concerning the delivery of service in that market. In essence, a bilateral agreement acts as a gateway to, and a guarantee of, increased competition in the two countries at both ends of the agreement. Thus, we find that in these situations, there is no need to conduct an inquiry into the effective competitive opportunities in the other country's market.

144. Consistent with the framework we adopt today for satellites licensed by WTO Members, where we also rely on a presumption of enhanced competition, opposing parties will have the opportunity to demonstrate, and we may determine on our own motion, that grant of the application would cause competitive harm to the U.S. satellite market. In addition, the application will be subject to other public interest requirements, and must comply with Commission technical and service rules, as discussed below.

145. We have noted the suggestions about how we should conduct bilateral negotiations. Expedient action to advance competition in satellite services and development of global systems for the benefit of United States consumers is a paramount Commission goal. This objective will continue to be part of our approach as we enter bilateral discussions. Commenters such as PanAmSat and GE Americom can be assured that we will retain authority to monitor competitive conditions and compliance with the terms of a bilateral agreement, as well as our authority to revoke or condition authorizations as necessary to address any competitive concerns that might develop. In addition, we will not adopt a rule requiring us to take action on pending earth stations during bilateral discussions, as Orion suggests. Rather, we will make an assessment of the best way to proceed based on the circumstances at the time.

2. Spectrum Availability

146. In both the *Notice* and *Further Notice*, the Commission proposed that it would consider other public interest factors. These factors include, for example, spectrum

²⁹¹ PanAmSat FNPRM Comments at 8 n.16. For example, according to PanAmSat, if a bilateral agreement covered both FSS and DTH and the non-U.S. party subsequently denied U.S. operators access to its market for FSS services, the U.S. could deny both DTH and FSS services to operators licensed by the non-U.S. party.

availability, foreign ownership, legal, technical, and financial qualifications, operating requirements, and national security, foreign policy and law enforcement and trade policy concerns.²⁹² We first discuss spectrum availability.

147. In the *Notice* and *Further Notice*, the Commission stated that spectrum availability constraints often impact the satellite licensing process.²⁹³ For example, the Commission often receives more applications for proposed satellites than it can accommodate in the spectrum available for a specific service. The Commission noted that in such cases it would not be able to accommodate all proposed non-U.S. satellites any more than it could accommodate all proposed U.S. satellites. Similarly, the Commission noted that where it already has licensed the maximum number of satellites that can be accommodated in a particular frequency band, we would not be able to offer opportunities for new entrants, including non-U.S. satellite systems. Further, it stated that it did not expect to require existing U.S. satellite systems to change their licensed operating parameters or to decrease their capacity in order to accommodate additional non-U.S. systems.

148. Commenters generally agree with our proposal to consider spectrum availability in determining whether to grant a non-U.S. satellite access to the U.S. market.²⁹⁴ COMSAT asks that any decisions based on spectrum availability be reasonable and objective in order to preclude the appearance of protectionist or discriminatory treatment.²⁹⁵

149. We adopt our proposal to consider spectrum availability as a factor in determining whether allowing a foreign satellite to serve the United States is in the public interest. We envision that issues of spectrum availability may arise regardless of whether the foreign operator seeks to use a proposed or existing non-U.S. satellite to serve the United States. First, a foreign operator may choose to participate in a U.S. space station processing round, a vehicle by which we concurrently consider all requests to implement satellites in the same frequency bands. Given the scarcity of available orbit and spectrum resources, it often is not possible to issue licenses to all entities that participate in a processing round. This situation undoubtedly will intensify as foreign satellites enter the market. We emphasize that the rules and policies we adopt in any subsequent processing round will apply to both U.S. and non-U.S. applicants. We agree with COMSAT that these procedures should be transparent and nondiscriminatory. As a result, however, we may be forced to deny a pending application, whether relating to a U.S. licensed or non-U.S. licensed space station, or to otherwise deny a request to serve the United States through a foreign satellite.

²⁹² *Notice* at ¶ 48; *Further Notice* at ¶ 37.

²⁹³ *Notice* at ¶ 50; *Further Notice* at ¶ 38.

²⁹⁴ AMSC FNPRM Comments at 4-6; Loral FNPRM Comments at 21; COMSAT FNPRM Reply Comments at 18.

²⁹⁵ COMSAT FNPRM Reply Comments at 18.

150. Further, spectrum considerations may arise in cases where the foreign service provider seeks access to the U.S. market by filing an earth station application to access an operating non-U.S. satellite. In these cases, we must determine whether, and to what extent, the proposed U.S. service will impact existing operations in the United States. We believe that, in the majority of cases, non-U.S. satellites meeting Commission technical requirements will be able to be coordinated to operate compatibly with U.S.-licensed systems. Nevertheless, there may be exceptional cases where grant would create debilitating interference problems or where the only technical solution would require U.S.-licensed systems to significantly alter their operations.²⁹⁶ In these cases, we would impose technical constraints on the foreign system's operations in the United States or, in cases where any such measures would be insufficient to remedy the technical problem, deny the request. We consider the same factors in acting on similar requests from U.S. applicants.²⁹⁷

3. Eligibility Requirements

a. Foreign Ownership

151. In the *Further Notice*, the Commission recognized that, as a result of the explosive growth of global satellite networks generally and open entry policies under the WTO Basic Telecom Agreement, there likely will be an increase in foreign investment in satellite facilities that serve the United States. Consequently, foreign ownership issues may arise. Section 310(b)(4) of the Communications Act authorizes the Commission to allow up to 100 percent indirect foreign ownership in common carriers. To the extent that Section 310 applies to an application for an earth station license to serve the United States as a common carrier, we will apply the rules established in our concurrent *Foreign Participation Order*.²⁹⁸ As discussed fully in that *Order*,²⁹⁹ we find that easing foreign investment in U.S. common carrier wireless markets will serve the public interest. Therefore, we adopt a rebuttable presumption that applications by investors from WTO Member countries to exceed the 25 percent foreign ownership limitation under Section 310(b)(4) will promote competition.

²⁹⁶ *Further Notice* at ¶ 38.

²⁹⁷ *See, e.g.*, GE American Communications, Inc., 3 FCC Rcd 6871 (1988) (denying GE's request to operate a high powered satellite at an orbital location from which it would cause unacceptable interference to adjacent U.S. satellites).

²⁹⁸ *See Foreign Participation Order*, Section III.D.

²⁹⁹ *Id.*

b. Legal, Financial, and Technical Qualifications**Background**

152. In the *Notice* and *Further Notice*, the Commission proposed to require foreign-licensed satellites to comply with all Commission qualification requirements for the particular satellite service involved before we would grant them access into the U.S. market. It did so to promote the efficient use of the scarce and valuable orbit/spectrum resource to the ultimate benefit of U.S. consumers.³⁰⁰

Positions of the Parties

153. Most commenters support our proposal to require foreign operators to meet the same qualification criteria we impose on U.S. applicants.³⁰¹ PanAmSat asserts that this is necessary "to ensure fair and effective competition," while Orion observes that waiving obligations for non-U.S. satellites would create an incentive for U.S. entities to circumvent Commission rules by obtaining licenses from other countries.³⁰² In contrast, ICO, Columbia, and Lockheed Martin urge that where a foreign operator has received a license from another administration and international coordination has been completed, further Commission review is unnecessary because the operator already has demonstrated to a regulatory body that it is qualified to hold a license.³⁰³ Hughes states that applying any U.S. qualification requirements to non-U.S. operators that go beyond technical compatibility could deter foreign entry and deprive U.S. consumers of the benefits of added competition.³⁰⁴ It further argues that, if adopted, our proposed qualification requirements could cause other countries to adopt similar duplicative requirements or impose retaliatory space station licensing or other burdensome requirements on U.S. licensed satellite operators seeking to provide service in foreign markets.³⁰⁵

³⁰⁰ *Notice* at ¶¶ 17 and 54-56; *Further Notice* at ¶¶ 37-46, 50, and 53.

³⁰¹ See GE Americom FNPRM Comments at 9; Motorola FNPRM Comments at 6-7. See, e.g., AMSC FNPRM Reply Comments at 8-9; Loral FNPRM Comments at 23-24; Orion FNPRM Comments at 14; UTC FNPRM Comments at 2; Winstar FNPRM Comments at 1-2.

³⁰² PanAmSat FNPRM Comments at 8; Orion FNPRM Reply Comments at 5 n.12.

³⁰³ ICO FNPRM Comments at 10-11; Columbia FNPRM Comments at 7-8; Lockheed Martin FNPRM Reply Comments at 3.

³⁰⁴ Hughes FNPRM Reply Comments at 9-10.

³⁰⁵ *Id.*

Discussion

154. Through numerous rulemakings intended to authorize innovative commercial satellite services, the Commission has developed various qualification requirements that are designed to maximize the number of competitive systems available to customers while ensuring spectrum efficiency.³⁰⁶ To this end, we require U.S. satellite applicants to demonstrate their legal, financial, and technical qualifications to hold a license before we will grant such applications. Given the differences in the technical, spectrum, and sharing characteristics in different satellite services (*e.g.*, Big LEO as compared to Little LEO systems), the Commission has adopted qualification requirements that differ somewhat from service to service.

155. In adopting a framework under which to consider U.S. market access by non-U.S. satellites, we recognize the importance of proceeding cautiously before restricting or conditioning entry by foreign operators. We proceeded cautiously when we adopted and refined our rules for *domestic* entry. From the beginning, our "Open Skies" policy was designed to allow the maximum number of U.S. satellites to operate with maximum flexibility in the United States.³⁰⁷ This policy, however, did not mean that U.S. entry into the domestic satellite market was unlimited. Our entry standards necessarily balanced our goal of promoting competition with the recognition that the orbit and frequency spectrum was a limited and valuable resource.³⁰⁸ We designed technical requirements to accommodate the maximum number of systems in orbit and to ensure that a proposed system would be compatible with ongoing and future operations in a particular frequency band; we adopted financial requirements to ensure that orbit and spectrum resources are used efficiently, not wasted, by requiring applicants to demonstrate that they are fully capitalized and financially able to implement systems; and we imposed legal requirements to ensure that licenses are not awarded to entities previously found to have violated U.S. laws or Commission rules.

156. We conclude that it is necessary to apply these same considerations to requests to serve the United States using foreign-licensed satellites. First, technical requirements must be met because allowing a foreign-licensed satellite to provide service into the United States may cause unacceptable interference with U.S. systems and possible service disruptions to

³⁰⁶ See, *e.g.*, *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 FCC Rcd 5936 (1994) (adopting rules to accommodate five Big LEO systems, requiring each to be capable of serving the United States at all times); *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, 54 Rad. Reg. (P&F) 577 (1983) (reducing orbital spacings between U.S. satellites to 2 degrees and adopting more stringent technical requirements to permit closer spacings).

³⁰⁷ *Domestic Communications Satellite Facilities*, 22 FCC 2d 86 (1970) (Domsat I).

³⁰⁸ See *Domestic Communications Satellite Facilities*, 35 FCC 2d 844 (1972) (Domsat II).

customers. Other countries have not adopted the same spectrum-maximizing technical requirements that we have imposed, such as two degree orbital spacing between geostationary orbit satellites, power limitations, and stringent out-of-band emission limits. Thus, it is necessary to examine a non-U.S. satellite's compliance with Commission technical requirements prior to granting a request to serve the United States.

157. Second, we must apply our financial rules to all systems serving the United States, including those involving non-U.S. space stations. The Commission's financial requirements, established under Section 308(b) of the Communications Act,³⁰⁹ are based on our repeated experience that undercapitalized companies have difficulty raising the hundreds of millions of dollars needed to finance a satellite system, even after receiving a Commission license. Historically, such companies have tied up valuable orbit resources for years while attempting, often unsuccessfully, to build their proposed systems -- to the exclusion of other financially qualified entities. Reserving orbit locations or spectrum for future non-U.S. satellites without examining whether the operator is financially qualified to build the system could block entry by other U.S. or foreign companies that have the financial capability to proceed, ultimately delaying service to the public. It is therefore necessary to continue to apply our financial qualification rules to any entity seeking to serve the United States.

158. Third, consistent with the Commission's public interest responsibilities under Sections 308 and 309, we impose legal qualifications to U.S. licensees.³¹⁰ One of the purposes of our legal requirements is to ensure that entities providing satellite services in the United States will abide by Commission rules. This is especially important for satellite services, where the costs and value of a system are high, and technical coordination and interference concerns are paramount. We realize that there is no guarantee that an entity will comply with our rules, but find that certain information may provide relevant indicia of compliance. For example, violations of law by an applicant, particularly those relating to credibility, may be evidence that it will not comply with Commission rules.³¹¹ Thus, it is vital that the Commission obtain assurance that an applicant will follow the rules that we have established over the years to maximize the development of efficient, compatible, and innovative satellite systems in the public interest.

159. Consequently, we conclude that when considering a request for authority to use a non-U.S. space station to serve the U.S. market, we must apply the same qualification criteria with respect to the foreign space station as we do for a U.S. licensed space station.

³⁰⁹ 47 U.S.C. § 308(b).

³¹⁰ 47 U.S.C. §§ 308(b), 309. Section 308(b), for example, permits us to consider character and citizenship qualifications.

³¹¹ See, e.g., *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252, 3252 (1990); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988).

We find that requiring prospective foreign entrants to meet the same qualification requirements we apply to U.S. applicants is consistent with our MFN and national treatment obligations under the GATS. If this policy causes other countries to adopt licensing requirements for U.S. satellite operators seeking to provide service in that country, as Hughes suggests, we find it on balance to be a minimal burden when compared to the possibility that unrestricted entry by foreign-licensed satellite systems would vitiate our orbit efficiency policies. Indeed, we do not expect other countries' licensing requirements to be a burden in most instances. Most of our largest trading partners are WTO-member countries, where U.S. operators must receive national treatment.

4. Operating Requirements

160. As described above, in the *Notice* and *Further Notice*, the Commission proposed that, once operational, a non-U.S. satellite system serving the United States -- whether licensed by a WTO member or not -- would be subject to the same on-going requirements that apply to U.S. satellites. We address certain specific rules below.

a. Prohibition Against Exclusive Arrangements

Background

161. In the *Further Notice*, the Commission proposed to apply to the prohibition against exclusive service arrangements applicable to U.S. satellite operators providing international services to non-U.S. licensed satellite operators as well.³¹² An exclusive arrangement generally would take the form of an agreement between a space station operator or service provider that establishes a particular satellite as the only permissible facility by which to offer a particular satellite service between the United States and the foreign country. The prohibition was intended to facilitate global competition by furthering the use of multiple satellite systems in other countries and to ensure that all U.S. licenses have an opportunity to provide truly global service. The Commission stated that it intended to construe this prohibition bearing in mind that spectrum coordination and availability in particular countries may limit the number of systems that can provide service to that country.

162. In the *Further Notice*, the Commission proffered two alternative approaches to applying this restriction to foreign satellite operators. First, under the narrow approach, the Commission suggested that it could condition any authority for the foreign system to serve the United States on the foreign satellite not providing service between the United States and any specific country with which such satellite already has entered into an exclusive arrangement.³¹³ Under the broader approach, the Commission suggested that it could subject

³¹² *Further Notice* at ¶¶ 41-42.

³¹³ *Id.*

an authorization to the general condition that the licensee may not serve the U.S. market at all if it maintains exclusive arrangements with *any country*.³¹⁴

Positions of the Parties

163. Most commenters generally support conditioning grant of any authorization to serve the United States through the use of a non-U.S. satellite on the prohibition against exclusive arrangements.³¹⁵ Columbia additionally supports license revocation for violation of the condition.³¹⁶ PanAmSat specifically asserts that *all* foreign systems serving the U.S. market -- including those from WTO and non-WTO countries and for covered and uncovered services -- must be subject to the prohibition against maintaining an exclusive relationship with *any* foreign country.³¹⁷ It claims that the ability of a non-U.S. system to serve some routes closed to U.S. systems will disadvantage U.S. systems on all routes.³¹⁸ Orion notes, however, that the Commission may lack the authority to condition licenses involving WTO member satellites, absent a showing that the exclusive arrangement will create a very high risk to competition in the U.S. market. Orion suggests, therefore, that we may be able to condition authorizations regarding non-WTO satellites.³¹⁹

164. On the other hand, TMI opposes our proposal to extend the prohibition on exclusive arrangements to non-U.S. satellites. TMI contends that the proposal is unworkable, unreasonably vague, inconsistent with the Commission's policies for telecommunications carriers, and would violate MFN and national treatment because most U.S. satellite licensees, including AMSC, are not subject to such a rule.³²⁰ TMI also submits that in most cases access to non-U.S. satellites will be triggered by a user request through an earth station application.³²¹ It states that such users usually will have no knowledge of the satellite operator's non-U.S. business practices, and that it would be unrealistic to hold an earth station

³¹⁴ *Further Notice* at ¶ 43.

³¹⁵ Columbia FNPRM Comments at 5; PanAmSat FNPRM Comments at 8-9; PanAmSat FNPRM Reply Comments at 3; Motorola FNPRM Comments at 4 and n.7.

³¹⁶ Columbia FNPRM Comments at 5.

³¹⁷ PanAmSat FNPRM Comments at 8-9; PanAmSat FNPRM Reply Comments at 3.

³¹⁸ PanAmSat FNPRM Comments at 8-9.

³¹⁹ Orion FNPRM Comments at 14-15.

³²⁰ TMI FNPRM Supplemental Comments at 8-11; Space Communications FNPRM Reply Comments at 5 (citing *Further Notice* at ¶ 42).

³²¹ TMI FNPRM Supplemental Comments at 9 n.18.

operator responsible for compliance with this limitation.³²² Space Communications claims that a prohibition against exclusive arrangements -- even if such arrangements do not adversely affect market access for U.S. competitors -- is unnecessarily broad and not likely to foster innovation or competition.³²³

165. TMI, in addition, claims that our alternative proposal to impose a broad condition prohibiting the non-U.S. provider from serving the U.S. market at all if it maintains exclusive arrangements with *any* country "would plainly negate the United States' WTO schedule of market opening commitments," and would violate the MFN and national treatment provisions of the GATS.³²⁴ Instead, TMI recommends that we review, on a case-by-case basis, the anticompetitive impact, if any, of an exclusive arrangement entered into by a non-U.S. satellite operator. TMI contends that our policies barring anticompetitive practices, together with our complaint procedures, provide sufficient regulatory safeguards to deter arrangements that may substantially impair competition for U.S. satellite services.³²⁵

Discussion

166. The goal of our exclusive arrangement prohibition is to maximize fair and effective competition. TMI correctly notes that certain U.S. satellite operators, including AMSC, are not subject to this license condition. The more recently licensed satellite operators are, however, subject to this prohibition, including Big LEO and 28 GHz licensees.³²⁶ Further, the Commission recently adopted service rules in the second processing round for the Little LEO service prohibiting exclusive arrangements.³²⁷ To continue to advance these procompetitive objectives, we expect to apply this prohibition to future U.S.

³²² *Id.*

³²³ Space Communications FNPRM Reply Comments at 5.

³²⁴ TMI FNPRM Supplemental Comments at 8 n.16 (citing *Further Notice* at ¶ 43).

³²⁵ TMI FNPRM Supplemental Comments at 11. See AirTouch FNPRM Comments at 4 (asserting that if a non-U.S. licensed MSS provider seeks to serve a non-WTO market (as well as the U.S. market), the Commission can address any competition concerns by applying the same rules to those entities that it applies to U.S. licensed systems, citing the prohibition on exclusive arrangements).

³²⁶ *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band*, 11 FCC Rcd 12861 (1996), 61 FR 9944 (March 12, 1996) (Big LEO Recon); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Bands, to Reallocate the 29.5-30.0 GHz Frequency Bands, to Establish Rules and Policies for local Multipoint Distribution Services and for Fixed Satellite Services*, FCC 97-378 (released October 15, 1997), 62 FR 61448 (November 18, 1997) (Ka-Band Service Rules).

³²⁷ *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, FCC 97-370 (released October 15, 1997), 62 FR 59293 (November 3, 1997) (*Second Round Little LEO Report and Order*).

licensees. Similarly, we will apply the prohibition to non-U.S. operators as we grant them access to the U.S. market. We will therefore attach a condition to entry into the U.S. market that prohibits a foreign operator from providing any service between the United States and *any country* with which such satellite has an exclusive arrangement. We will not, however, adopt the alternative proposal prohibiting *any* service in the United States if the foreign operator has *one* such agreement. Such a broad condition would go beyond our defined goal of protecting effective competition in the United States.

167. Thus, we will prohibit a non-U.S. satellite operator from providing service between the United States and any country in which it has entered into an exclusive agreement to provide satellite capacity for a particular service. This approach is consistent with our national treatment and MFN obligations under the GATS because we will be treating non-U.S. satellites the same as U.S. satellites, and will treat all non-U.S. satellites similarly. Finally, in response to TMI's claim that this would be inconsistent with the Commission's policies for international telecommunications carriers, we note that our approach here is based on spectrum, competitive and other characteristics unique to the satellite environment.

b. Other Service Rules

Background

168. In the *Notice* and *Further Notice*, the Commission proposed to hold foreign entrants to all other service rules imposed on U.S. licensees. The Commission raised, as an example, the rule that requires Big LEO licensees to be capable of providing continuous service in the United States.³²⁸ The Commission proposed to extend this to all non-U.S. Big LEO operators as well. The commenters raised the applicability of four other service rules, which we discuss below.³²⁹

Positions of the Parties

169. Loral and UTC contend that we should extend to non-U.S. licensed systems operating within the United States the Commission rule on relocating microwave operators from the 2 GHz frequency band.³³⁰ They claim that if non-U.S. satellites were exempt, they would be unjustly enriched by receiving the benefit of access to cleared spectrum without sharing the financial burden imposed on U.S. licensees, which would distort competition in

³²⁸ 47 CFR § 25.143(b)(2)(iii).

³²⁹ *Further Notice* at ¶¶ 39-44.

³³⁰ Loral FNPRM Comments at 24 (citing *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, FCC 97-93 (released March 14, 1997)); UTC FNPRM Comments at 3.

the United States.³³¹ Hughes, by contrast, advises that the Commission should proceed cautiously in imposing obligations on foreign licensees such as paying for relocation costs of incumbent licensees.³³²

170. Second, some parties ask us to extend the universal service requirements recently adopted for U.S. satellite operators to non-U.S. satellite operators providing domestic service.³³³ Loral states that the *Universal Service Report and Order* exempts from universal service contributions foreign satellite operators that provide international service only, that is, foreign operators that provide satellite service between the United States and another country but do not provide any domestic interstate service.³³⁴ It adds that the *Order* appears to impose contribution obligations on U.S. licensed service providers (including Loral Skynet) that provide international *and* domestic interstate satellite services -- a result it contends is "patently unfair" and inconsistent with national treatment.³³⁵ Loral recommends that the Commission ensure that our rules do not arbitrarily advantage entities that provide satellite services to or from the United States but that do not provide domestic, interstate satellite services. GE Americom favors parity with respect to universal service contributions, asserting that any disparate treatment between U.S. and non-U.S. providers would harm competition in the U.S. satellite services market.³³⁶

171. Third, AMSC asserts that non-U.S. systems operating in the "L-band" frequencies should be required to comply with requirements for provision of priority and preemptive access to safety services, and for the provision of relay services for persons with hearing and speech disabilities.³³⁷

³³¹ Loral FNPRM Comments at 24; UTC FNPRM Comments at 3. UTC submits that utilities depend on reliable and secure communications to assist them in carrying out their public service obligations and many operate private networks in the 2 GHz band. According to UTC, any relocation of incumbent licensees in that band should not impair incumbents operationally or financially. *Id.*

³³² Hughes FNPRM Reply Comments at 10, n.26.

³³³ *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) (*Universal Service Report and Order*). See, e.g., AMSC FNPRM Reply Comments at 9; Loral FNPRM Comments at 27; GE Americom FNPRM Comments at 11, n.2; GE Americom FNPRM Reply Comments at 9; Orion FNPRM Reply Comments at 5.

³³⁴ Loral FNPRM Comments at 27 and n.50 (citing *Universal Service Report and Order* at ¶ 779). In reply comments, GE Americom states that "fees and contribution requirements must be equitably assessed against all satellite operators serving the U.S. market," but does not specifically assert support for universal service contributions. GE Americom FNPRM Reply Comments at 9.

³³⁵ Loral FNPRM Comments at 27.

³³⁶ GE Americom FNPRM Comments at 11-12 and n.2.

³³⁷ AMSC FNPRM Reply Comments at 9.

172. Fourth, some parties suggest that non-U.S. satellite providers be required to pay the regulatory fees associated with holding a space station license as a means of paying their fair measure of the costs of Commission activities.³³⁸ They argue that, because the Commission will not be issuing space station licenses to foreign operators, these operators will be exempt from paying this fee, which would afford foreign operators an unfair competitive advantage in the United States.³³⁹ Loral argues that the Communications Act gives the Commission authority to amend the regulatory fee schedule when there are changes in law (here, the WTO Basic Telecom Agreement), and recommends that we do so for FY 1998.³⁴⁰ PanAmSat argues that equitable and nondiscriminatory application of regulatory fees and costs is required to comply with the United States' national treatment obligations under the GATS and will create a level competitive playing field.³⁴¹ Lockheed Martin concurs that non-U.S. licensed satellite operators should pay fees to cover the costs of Commission activities, but argues that the Commission does not coordinate foreign satellite systems internationally. Consequently, it argues that non-U.S. operators should not be required to pay that portion of the annual fees associated with international coordination activities.³⁴²

Discussion

173. In general, we will require non-U.S. satellite operators to comply with all Commission rules applicable to U.S. satellite operators. To do otherwise would place U.S. and foreign operators on an uneven competitive footing when providing identical satellite services in the United States and would defeat our public policy objectives in adopting these service rules in the first place. We will consider requests for waivers of any rules, by foreign or domestic providers, on a case-by-case basis. We find that this overall approach does not violate U.S. national treatment obligations because we will be treating foreign service suppliers identically to U.S. service suppliers with respect to their provision of service *within* the United States. As to the parties' specific recommendations, we agree with Loral and UTC that we should require satellite systems operating in the 2 GHz band in the United States to bear a proportionate share of the terrestrial relocation costs; and with AMSC that foreign

³³⁸ See, e.g., AMSC FNPRM Reply Comments at 9; GE Americom FNPRM Comments at 11; GE Americom FNPRM Reply Comments at 9; Orion FNPRM Reply Comments at 5; PanAmSat FNPRM Reply Comments at 3. PanAmSat recommends that regulatory and application fees applicable to non-U.S. licensed systems be adjusted based on the amount of Commission resources required to authorize access to those systems. PanAmSat FNPRM Reply Comments at 3.

³³⁹ GE Americom FNPRM Comments at 11; Loral FNPRM Comments at 24, 25 and n.46 (citing 47 CFR § 1.1156).

³⁴⁰ Loral FNPRM Comments at 26-27.

³⁴¹ PanAmSat FNPRM Reply Comments at 3.

³⁴² Lockheed Martin FNPRM Reply Comments at 4-5.

satellite operators in the L-band should comply with priority and preemptive access requirements for aeronautical safety services and relay service requirements. We will address issues relating to fees in a separate proceeding.

174. In responding to assertions that all satellite operators, regardless of whether they provide interstate telecommunications, should be required to contribute to universal service support mechanisms, we rely on the Commission's analysis in the *Universal Service Report and Order*.³⁴³ In that *Order*, the Commission determined that, pursuant to Section 254 of the Act, carriers that provide only international telecommunications but not interstate telecommunications services, are not required to contribute to universal service support mechanisms.³⁴⁴ The Commission recognized that, by this decision, some providers of international service would be required to contribute and some would not. Expressing a preference for a more competitively neutral outcome, the Commission concluded, nonetheless, that Section 254 of the Act does not permit us to assess contributions on the revenues of carriers that do not provide interstate telecommunications. Further, however, the Commission stated that, should the competitive concerns arising from this decision become significant, it would revisit the issue. In addition, it is noteworthy that some parties have petitioned the Commission to reconsider this decision. Finally, the Commission's interpretation of Section 254 of the Act does not, contrary to the assertion of parties, violate national treatment obligations, because any carrier, regardless of where it is licensed or located, that provides both interstate and foreign telecommunications services must contribute to the extent that it provides both interstate and foreign telecommunications.

5. Foreign and Domestic Policy Factors

Background

175. In both the *Notice* and *Further Notice*, the Commission proposed to examine other factors that bear on whether the grant of the application is in the public interest, convenience and necessity.³⁴⁵ The *Notice* specifically noted that we would consider issues of national security, law enforcement, foreign policy and trade policy brought to our attention by the Executive Branch in reviewing license applications.

³⁴³ *Universal Service Report and Order* at ¶ 779.

³⁴⁴ 47 U.S.C. § 254(d). Section 254(d) of the Act states:

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis. . . to preserve and advance universal service.

³⁴⁵ *Notice* at ¶ 48; *Further Notice* at ¶ 15.

Positions of the Parties

176. Executive Branch commenters strongly support our consideration of these additional public interest factors.³⁴⁶ Lockheed Martin acknowledge both the validity of national security and law enforcement concerns, while Deutsche Telekom notes that examination of national security concerns is permitted by the GATS in very narrow circumstances.³⁴⁷

177. Many other commenters object to the Commission's proposal to consider foreign policy and trade policy issues raised by the Executive Branch in determining whether to grant access to non-U.S. satellites systems, on the grounds that such considerations are inconsistent with GATS obligations.³⁴⁸ For example, the Government of Japan takes particular issue with considering foreign policy and trade concerns, arguing that we should eliminate those from consideration.³⁴⁹ Similarly, Skybridge states that denial of a license to a WTO satellite system based on either foreign policy or trade concerns would raise serious questions with respect to U.S. compliance with the GATS. According to Skybridge, discriminatory treatment of prospective licensees from WTO Members based on trade concerns is essentially a repudiation of MFN treatment.³⁵⁰ France Telecom and Lockheed Martin also argue that the Commission must be very careful that this assessment is neither used nor perceived as a surrogate for considerations of trade issues that were put to rest with the U.S. commitment in the WTO Basic Telecom Agreement to open our telecommunications market.³⁵¹

Discussion

178. We agree with comments of the Executive Branch supporting consideration of national security, law enforcement, foreign policy and trade policy concerns. In general, objections to the Commission considering these issues focus on inconsistency with the GATS.

³⁴⁶ DOD FNPRM Comments at 3-4; USTR FNPRM Reply Comments at 4-5.

³⁴⁷ Lockheed Martin FNPRM Reply Comments at 5-6; Deutsche Telekom FNPRM Reply Comments at 12 (arguing that the GATS Agreement contains a very specific exception under which a WTO Member country may act on behalf of its national security).

³⁴⁸ Government of Japan FNPRM Comments at 2; Telesat FNPRM Comments at 5; Lockheed Martin FNPRM Comments at 5; ICO FNPRM Comments at 10; Skybridge Comments at 3; AirTouch FNPRM Comments at 2; Deutsche Telekom FNPRM Reply Comments at 11; GE Americom FNPRM Reply Comments at 4; France Telecom FNPRM Reply Comments at 3-4; Lockheed Martin FNPRM Reply Comments at 5.

³⁴⁹ Government of Japan FNPRM Comments at 2.

³⁵⁰ Skybridge FNPRM Comments at 3-4.

³⁵¹ France Telecom FNPRM Reply Comments at 4; Lockheed Martin FNPRM Reply Comments at 5.

We conclude that nothing in the GATS precludes us from considering such concerns. There is no bar in GATS Article VI (Domestic Regulation) as long as our consideration is objective, transparent, impartial and reasonable. Nor does the MFN obligation automatically bar consideration of any particular factor. It provides merely that like service suppliers have to receive like treatment. Similarly, the national treatment obligation does not exclude consideration of these other public interest factors. In a particular case, where we do consider these other public interest factors, we will be mindful of U.S. WTO obligations to the extent that the exemptions in the GATS specifically do not apply.³⁵² We do not expect to receive recommendations from the Executive Branch in connection with these other public interest factors that are inconsistent with U.S. international obligations.

179. We recognize that other federal agencies have specific expertise in matters that may be relevant in particular cases. In any given case, an application by a foreign applicant may raise questions, for example, about this country's international treaty obligations. In addition, we realize that foreign participation in the U.S. telecommunications and satellite market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch. The Commission will consider any such legitimate concerns as we undertake our own independent analysis of whether grant of a particular authorization is in the public interest.

180. We emphasize, however, that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised only in very rare circumstances. Contrary to the fears of some commenters, the scope of concerns that the Executive Branch will raise in the context of applications for earth station licenses is narrow and well defined. National security and law enforcement concerns have long been treated as important public interest factors by this Commission.³⁵³ We note that, during our two years' experience in administering the *Foreign Carrier Entry Order*, with approximately 140 authorizations granted to carriers with foreign ownership, the Executive Branch has never asked the Commission to deny an application on national security or law enforcement grounds. Similarly, we note that the Executive Branch, during the last two years, has never informed us that a foreign policy concern dictated that a Section 214 or Section 310(b)(4) application be denied. We expect this pattern to continue, such that the circumstances in which the Executive Branch would advise us that a pending matter affects national security, law enforcement, or obligations arising from international agreements to which the United States is a party will be quite rare. Any such input would, however, be important to our public interest analysis of a particular application. We thus will continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us.

³⁵² See GATS Articles XIV and Article XIV bis.

³⁵³ *Id.*

181. USTR has asked, after coordination with other Executive Branch agencies, the Commission on four occasions during the last two years not to act on certain applications because of trade concerns.³⁵⁴ We note that all these requests occurred before the effective date of the WTO Basic Telecom Agreement. The Agreement changes the U.S. Government's trade obligations affecting basic telecommunications services. USTR has indicated that it expects any Executive Branch concerns communicated to the Commission under our new rules to be fully consistent with U.S. law and international obligations, including the WTO Basic Telecom Agreement. USTR has also specified the scope of its authority to communicate trade policy concerns to the Commission in its reply comments.³⁵⁵ In light of the WTO Basic Telecom Agreement, we expect to receive input from USTR on specific applications far less often than we have in the past. We will continue to evaluate any such input as part of our public interest determination, consistent with U.S. law and U.S. international obligations, including the WTO Basic Telecom Agreement.

182. We emphasize that the Commission will make an independent decision on applications to be considered and will evaluate concerns raised by the Executive Branch agencies in light of all the issues raised (and comments in response) in the context of a particular application. We expect that the Executive Branch will advise us of concerns relating to national security, law enforcement, foreign policy, and trade concerns only in very rare circumstances. Any such advice must occur only after appropriate coordination among Executive Branch agencies, must be communicated in writing, and will be part of the public file in the relevant proceeding.³⁵⁶

³⁵⁴ Letter from Jeffrey M. Lang, Deputy United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Aug. 8, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 3, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 31, 1996); Letter from Larry Irving, Assistant Secretary, National Telecommunication and Information Administration, Department of Commerce, Jeffrey M. Lang, Deputy United States Trade Representative, and Ambassador Vonya McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Reed Hundt, Chairman, Federal Communications Commission (Mar. 7, 1997).

³⁵⁵ USTR *Foreign Participation* Reply Comments at 6 n.11.

³⁵⁶ To the extent the Executive Branch must share classified information with Commission staff, such information is not subject to public disclosure.

C. Access Procedures

1. Framework

183. To implement our framework allowing non-U.S. satellites to serve the United States, we must adopt licensing procedures that ensure that prospective foreign providers receive fair consideration. In both the *Notice* and *Further Notice*, the Commission stated that it did not intend to issue separate (and duplicative) U.S. licenses for those space stations under the jurisdiction of another licensing or coordinating administration. Instead, it envisioned two procedural avenues by which foreign space stations could serve the U.S. market.³⁵⁷

184. The first procedure would be used when the service provider or satellite operator participates in a U.S. space station "processing round" as a means of ensuring that an existing or planned foreign satellite will have access to the orbit or spectrum resources needed to serve the United States. The Commission generally considers applications for satellite systems that will operate in the same frequency bands in discrete processing rounds to ensure that all potentially competing applications are considered concurrently. These processing rounds are established by Public Notices announcing a "cut-off date" for filing applications to be considered in the round. In order to participate in a space station processing round, the Commission proposed to permit a service supplier to file an application for a U.S. earth station that would operate with a foreign satellite by the cut-off date specified in the Public Notice. Alternatively, the foreign space station operator could file, by the cut-off date, a "letter of intent" to use its non-U.S. satellite to provide service in the United States through future earth stations that may or may not be ultimately licensed to it.

185. Once a request for U.S. access through a non-U.S. licensed satellite is properly before it in a processing round, the Commission would consider it, together with any applications for U.S.-licensed satellites that are properly filed.³⁵⁸ If, in processing that group, the Commission authorizes a non-U.S. satellite to serve the United States, it will provide this authority, in an earth station license or, in the case of a letter of intent, as a "reservation" or

³⁵⁷ *Notice* at ¶¶ 13-15; *Further Notice* at ¶¶ 47-49.

³⁵⁸ Applicants wishing to use non-U.S. licensed satellites will generally be required to provide the information listed in Section 25.114 of our rules. 47 CFR § 25.114. We will however, not require foreign applicants to provide financial information if the non-U.S. licensed satellite is in-orbit and operating or to provide technical information when the international coordination process for the non-U.S. satellite has been completed. See Section III.C.2.

"designation" of frequencies or orbit locations or both, in the attendant service Report and Order.³⁵⁹

186. The second procedure by which the Commission could consider foreign requests for U.S. access involves the earth station licensing process independent of a processing round. In the *Further Notice*, the Commission noted its expectation that this procedure would be used where an earth station to be located in the United States seeks to access a non-U.S. satellite that is already operating and for which the international coordinated process, pursuant to the regulations of the International Telecommunication Union (ITU), has been initiated.³⁶⁰ There, it would grant an earth station license provided that the proposed system met our public interest analysis.

187. The commenters support the proposal not to re-license non-U.S. satellites. They also support our proposal to permit foreign satellites access to the United States through an earth station license.³⁶¹ No one objects to the alternative proposal to allow foreign satellite operators to participate in Commission space station processing round by filing a letter of intent to use the satellite to provide service in the United States. Indeed, Hughes notes that it favors the flexibility that would be afforded to non-U.S. system operators by alternative licensing procedures.³⁶²

188. Consequently, we adopt our proposed procedural framework for accessing the U.S. market. We will not issue a separate, and duplicative, U.S. license for a non-U.S. space station. Issuing a U.S. license would raise issues of national comity, as well as issues regarding international coordination responsibilities for the space station. We will, instead, license earth stations located within U.S. territory to communicate with particular non-U.S. satellites. As with other U.S.-licensed earth stations, we will not require the prospective earth station operator to obtain a construction permit. Rather, the applicant may begin construction before it obtains a station operating license at its own risk. We also adopt our proposal to implement a procedural framework that allows space station operators and service providers two methods for accessing the U.S. market through a non-U.S. satellite: (1) by participating in a U.S. space station processing round through an earth station application or letter of intent; or (2) by filing an earth station application that we may consider independent of a processing round.

³⁵⁹ We reiterate our intent to hold non-U.S. satellite operators to the same rules as we do our U.S.-licensed space station operators. Failure to comply with these requirements could result in revocation of the earth station license or reassignment of previously reserved or designated spectrum or orbit locations.

³⁶⁰ *Further Notice* at ¶ 55.

³⁶¹ See, e.g., Telesat FNPRM Comments at 7; Loral FNPRM Comments at 21; Hughes FNPRM Comments at 21-24.

³⁶² Hughes FNPRM Comments at 18-19.

2. Information Requirements

189. Regardless of which procedural avenue prospective foreign service suppliers choose to request access to the U.S. market, the Commission proposed to require these suppliers to provide detailed information about the non-U.S. space station and its operator.³⁶³ The purpose is to allow the Commission to determine whether operations via the non-U.S. satellite system comply or will comply with all Commission technical requirements, and that earth and space station operators meet all other applicable Commission qualification requirements. Specifically, the Commission proposed that all earth station applications and letters of intent be accompanied by an exhibit containing the information required by Section 100.13 (for DBS satellites) or Section 25.114 (for all other satellites) of its rules with respect to the proposed non-U.S. satellite, together with an ECO-Sat showing if appropriate.³⁶⁴ The Commission stated that this information would be used to perform spectrum management functions and to evaluate additional factors relevant to whether grant of access would be in the public interest. The Commission further stated that failure to require this information could constitute treatment more favorable for non-U.S. systems than for applicants seeking U.S. space station licenses. Nevertheless, the Commission said it would not require applicants to provide financial information if the non-U.S. licensed satellite is in-orbit or to provide technical data when the international coordination process between the United States and the licensing administration has been completed.³⁶⁵

190. Several commenters take issue with this proposal, arguing that requiring the proposed information constitute re-licensing.³⁶⁶ This information, however, is necessary to ensure compliance with each of the Commission requirements that, as discussed above, will apply to non-U.S. satellites. We can only determine whether service by a non-U.S. satellite in the United States is in the public interest if we have before us all the information we require U.S. applicants to provide. We will, therefore, require all entities wishing to serve the United States with a non-U.S. satellite, regardless of whether the satellite is already licensed by another administration, to file, together with their earth station applications or letters of intent, an exhibit providing the information required in Section 100.13 for DBS satellites or an exhibit providing the information required in Section 25.114, including FCC Form 312, for all other satellites. We also require an ECO-Sat analysis (or ECO-Sat analyses), when appropriate.

191. We will not, however, require entities to file financial information if the non-U.S. licensed satellite is in-orbit, or to file technical data when the international coordination

³⁶³ *Further Notice* at ¶ 60.

³⁶⁴ 47 CFR §§ 25.114 and 100.13.

³⁶⁵ *Further Notice* at n.44, 50.

³⁶⁶ GE Americom FNPRM Comments at 9-10; Hughes FNPRM at 17.

process for the non-U.S. satellite has been completed.³⁶⁷ First, where the international technical coordination process has been *completed* between the United States and the foreign satellite, we would not need additional technical information about the foreign satellite. This is because the United States and the relevant foreign administration will have exchanged extensive technical data about their respective systems during the course of the bilateral negotiations that lead up to a coordination agreement. This technical information is sufficient for us to determine whether the foreign satellite complies with Commission technical requirements. In all other cases, however, we would not have this information unless we specifically required the potential service supplier to file it. Similarly, where the foreign satellite is already in-orbit, there is no concern about whether the prospective entrant is financially capable of building and launching its system. Consequently, financial information is unnecessary in that instance.

192. We will streamline these procedures further where the Commission has already authorized a particular foreign satellite to provide a particular service in the United States. For example, if the Commission has authorized a satellite licensed to Country X to provide DTH service in the United States, we have determined, in the course of our review, that the foreign satellite system complies with all applicable Commission requirements and that Country X meets the ECO-Sat test. There is no need to require future earth station applicants to continue to provide this information. Rather, in those cases, we will allow the prospective foreign entrant to include an exhibit citing to the previous Commission grant of access for that satellite, and representing that it intends to use the satellite to provide the same services as those previously authorized, and that none of the system's operating parameters has changed.

3. Licensing and Coordination Status of Non-U.S. Satellites

Background

193. In the *Further Notice*, the Commission asked whether the non-U.S. satellite's licensing or international coordination status should be relevant in determining whether an earth station application or letter of intent is properly before us. In other words, the Commission asked whether it should consider granting access to a foreign satellite that is not yet licensed or that is not yet fully coordinated. The Commission indicated in the *Further Notice* that it would not necessarily require the foreign space station to be licensed before it would consider whether to allow that satellite access to the United States. Rather, the Commission proposed that non-U.S. satellites be eligible to participate in a processing round as long as its operator is *pursuing* a license from another administration. The Commission

³⁶⁷ *Further Notice* at ¶ 53-54.

also proposed that it would consider earth station applications outside of a processing round if the satellite is already licensed and/or fully coordinated in accordance with ITU regulations.³⁶⁸

Positions of the Parties

194. Loral argues that the Commission should not accept requests to access non-U.S. satellites unless the satellites have already been licensed.³⁶⁹ It contends that this approach is necessary to avoid having to revoke authority to serve the United States in situations where the foreign administration does not grant the license. In contrast, Columbia and Lockheed Martin suggest that a space station license grant from a foreign administration should not be necessary. Rather, they recommend that a non-U.S. applicant submit, as part of its application to the Commission, proof of its filing of an application with a foreign administration.³⁷⁰

Discussion

195. Generally, we require a space station to be licensed before we will license any earth station to communicate with that satellite. This prevents two possibilities: (1) that we will later have to revoke the earth station license if the space station is not ultimately licensed; and (2) that we will later need to act on an application to modify the earth station to reflect changes in the space station's operating parameters made during the licensing process, as is often the case. Accordingly, when U.S. companies file earth station applications to access U.S. space stations that have not yet been licensed, we return the applications as premature or dismiss them without prejudice.

196. Similarly, we will require the foreign space station to be licensed, or fully coordinated in those administrations that do not issue satellite licenses, in cases where an earth station operator seeks an immediate grant to access that satellite. If the space station is not licensed or coordinated, we will dismiss the earth station application, which may be refiled after the space station is licensed or coordinated. In contrast, we will not require a license as a prerequisite to participating in a U.S. space station processing round. Doing so would put prospective foreign entrants at a disadvantage. As noted, the Commission generally authorizes satellites in the context of discrete processing rounds. These processing rounds often involve new, innovative, and commercially unproven satellite services in frequency bands not previously used to provide satellite service. We generally attempt to license, from the group of pending applications, the maximum number of systems that can be accommodated in the available spectrum. If a prospective foreign entrant does not participate in a processing round, it runs the risk of being foreclosed from providing service in the

³⁶⁸ *Further Notice* at ¶¶ 49 and 52.

³⁶⁹ Loral FNPRM Comments at 24-25.

³⁷⁰ Columbia FNPRM Comments at 8; Lockheed Martin FNPRM Reply Comments at 4.

United States in those bands because we cannot accommodate any additional systems. Requiring the foreign entrant to secure a license from another administration *before* it can participate in a U.S. processing round, however, would place a burden on the foreign operator not placed on U.S. applicants. Instead, we will require a potential foreign entrant to submit, as part of its application to the Commission, proof that it is pursuing a license from a foreign administration.

4. Receive-Only Earth Stations

Background

197. Receive-only earth stations are used predominantly to receive direct-to-home video services, such as DTH and DBS services. In the *Notice* and *Further Notice*, the Commission proposed to continue to license receive-only earth stations operating with non-U.S. satellites, whether operating with WTO or non-WTO member satellites.³⁷¹ In doing so, the Commission recognized that it does not require receive-only earth stations receiving U.S.-originated signals over U.S. satellites to be licensed. The Commission noted that licensing receive-only stations operating with non-U.S. satellites was necessary to ensure that the station's operation would facilitate competition in the United States by considering public interest factors such as equivalent competitive opportunities in the home market and content regulation. The Commission also noted that such licensing is the only regulatory point available to the Commission because it will not be issuing U.S. licenses to space stations licensed or coordinated by other administrations. The Commission proposed, however, to eliminate the licensing requirement for receive-only earth stations operating with U.S.-licensed systems for the reception of signals originating in other countries. The Commission reasoned that its technical and other concerns would be taken into account when it granted the space station license.

Positions of the Parties

198. Hughes, PanAmSat, Space Communications, and AMSC support the proposal to continue to license receive-only earth stations operating with non-U.S. satellites.³⁷² Hughes argues that, absent licensing of the earth station used to access the foreign satellite, the Commission has no recourse against a non-U.S. satellite causing interference to other operations in the United States. AMSC similarly argues that, because the Commission has jurisdiction over the operation of satellite systems that provide service in the United States, it may choose to regulate the receive-only terminals instead of the space segment. Hughes and PanAmSat further argue that licensing receive-only earth stations would not violate national

³⁷¹ *Notice* at ¶¶ 75-80; *Further Notice* at ¶¶ 56-57.

³⁷² Hughes FNPRM Comments at 21-24; PanAmSat FNPRM Comments at 9; Space Communications FNPRM Reply Comments at 12; AMSC FNPRM Reply Comments at 11.

treatment obligations because most services involving receive-only earth stations are exempt from the WTO Basic Telecom Agreement.

199. In contrast, GlobeCast and Loral oppose licensing receive-only earth stations.³⁷³ Arguing that receive-only earth stations are passive and cannot cause interference to other radio stations, GlobeCast claims that international receive-only earth stations that are not subject to any international treaty restrictions should be free to operate without a license. It further claims that after the WTO Basic Telecom Agreement, the United States "no longer needs the market leverage that arguably was a reason to continue licensing international receive-only earth stations."³⁷⁴ Loral argues that, if the non-U.S. satellite has been coordinated with the United States pursuant to ITU procedures, its operations in the United States should not cause interference or technical concerns. Loral recommends that, if the transmissions from the foreign satellite have not been coordinated, the Commission should require the satellite operator to file a letter of intent to serve the U.S. market, including copies of the appropriate ITU filings.

200. Telesat Canada, TMI, and France Telecom argue that under our GATS national treatment obligations, we cannot require licensing of receive-only earth stations accessing non-U.S. satellites.³⁷⁵ Telesat further states that removing the licensing requirement for receive-only earth stations operating with U.S. satellites has been a "progressive step in the promotion of competition through the streamlining of regulation," and that the same should be done for receive-only earth stations operating with non-U.S. satellites.³⁷⁶ In addition, TMI argues that deregulating receive-only mobile terminals would end the discriminatory treatment of these terminals compared to terminals for paging and similar message services, which, like customer premises equipment, are not licensed by the Commission.³⁷⁷

Discussion

201. In proposing continued licensing for receive-only earth stations operating with non-U.S. satellites, the Commission's intent was to provide a vehicle by which we could examine factors specific to the non-U.S. *satellite*, such as equivalent competitive opportunities in the home market, content regulation, and spectrum management and other technical

³⁷³ GlobeCast FNPRM Comments at 5; Loral Comments at 32.

³⁷⁴ GlobeCast FNPRM Comments at 5.

³⁷⁵ Telesat FNPRM Comments at 9-10; TMI FNPRM Comments at 11; France Telecom FNPRM Reply Comments at 5.

³⁷⁶ Telesat FNPRM Comments at 9-10; TMI FNPRM Comments at 11-14; France Telecom FNPRM Comments at 5-6.

³⁷⁷ TMI FNPRM Comments at 13.

considerations. It also was to provide the Commission with a regulatory control point for transmissions entering the United States through foreign satellites.³⁷⁸ In short, the Commission proposed to license the receive-only terminal because we would *not* be licensing the satellite with which that earth station would be operating. If the downlink transmissions from the non-U.S. satellite interferes with other U.S. downlink transmissions, for example, licensing the earth station would provide us with our only means of maintaining control over the interfering transmissions into the United States. In addition, licensing the earth station would provide the only vehicle by which to evaluate effective competitive opportunities in foreign markets and other public interest considerations. We find that these concerns present a compelling argument to continue to require operators of receive-only earth stations operating with non-U.S. licensed satellites to obtain earth station licenses.

202. In contrast, in cases where the Commission *is* licensing the space station, we see no need to continue to license the receive-only earth station operating with that satellite, even if the transmissions originate in another country. Consequently, we adopt our proposal to eliminate the licensing requirement for all receive-only earth stations operating with U.S.-licensed satellites, regardless of where the signals originate.

203. We find that a continued licensing requirement for receive-only earth stations operating with non-U.S. satellites does not violate any of the United States' GATS obligations. When the earth stations are used to receive direct-to-home video (or in the future, audio) services, as are the vast majority, such treatment would not implicate any national treatment obligations under the WTO Basic Telecom Agreement and the GATS. As noted above, the United States undertook no obligations with respect to these services. Indeed, even with covered services, such as one-way satellite paging services, where we will not apply an ECO-SAT test, we would not be violating a national treatment obligation. For receive-only earth stations accessing either U.S. or non-U.S. satellites, we need to make sure that there is no interference, and evaluate other public interest factors. For receive-only earth stations communicating with U.S. licensed space stations, we are able to do so through the space station licensee. For receive-only earth stations communicating with non-U.S. space stations, however, we would not be able to look to the space station operator because we will not be licensing it. Thus, as described above, licensing the receive-only earth station provides us the necessary mechanism to make our treatment of foreign-licensed satellites comparable. We find that this is consistent with the GATS. As USTR points out, GATS treatment need not be identical. The issue is whether the conditions of competition have been modified to favor certain foreign or domestic suppliers.³⁷⁹ That is not the case here.

204. To impose the least burdensome requirements possible while fulfilling our regulatory responsibilities, we will permit applicants to request "blanket" licenses for large

³⁷⁸ Notice at ¶ 75; Further Notice at ¶¶ 56-58.

³⁷⁹ USTR FNPRM Reply Comments at 11, n.16.

numbers of technically identical receive-only antennas, such as home "dishes." Blanket applications may be filed by the space station operator, the service supplier, the equipment manufacturer, or the electronics retailer. Further, in cases where we have previously granted a particular satellite access to the United States to provide DTH/DBS or other receive-only services, we will allow the earth station applicant to include an exhibit citing to the previous Commission grant of access for that satellite and stating that it intends to use the satellite to provide the same services as those previously authorized.

205. Last, the Commission currently exempts receive-only earth stations operating with the INTELSAT K satellite or receiving Intenet I services from INTELSAT satellites from the licensing requirement.³⁸⁰ We will continue this policy for this limited class of receive-only earth stations.

5. Changes to Application Form

Background and Positions of the Parties

206. In the *Further Notice*, the Commission requested comment on any changes it should make to FCC Form 312 (Application for Satellite Space and Earth Station Authorizations), in light of rules or policies adopted in this *Report and Order*. Loral suggests two changes to make the application form consistent with the United States' WTO commitments: (1) request whether services to be provided by an FSS operator include broadcast video programming services for direct reception by customers; and (2) require applicants to provide copies of Appendix 4 and S4, as submitted to the ITU, as additional information on satellite system parameters.³⁸¹ PanAmSat argues that in addition to the service to be provided, the country in which the satellite is licensed or will be licensed, countries in which signals carried over the satellite will originate or terminate, and information regarding *de jure* and *de facto* entry barriers, Form 312 should require applicants to identify whether the non-U.S. satellite is owned, operated, or controlled by an IGO affiliate that was created after the release date of the *Further Notice*.³⁸² PanAmSat asserts that this information will assist the Commission in ensuring that grant of the application will not pose a competitive threat to the U.S. market.

Discussion

207. To make it easier for foreign applicants to know what information and exhibits are necessary to provide with a request to access the United States, we will modify Form 312 to cover non-U.S. licensed satellites as well as U.S. licensed satellites. To this end, we will

³⁸⁰ 47 CFR § 25.131(j).

³⁸¹ Loral FNPRM Comments at 33.

³⁸² PanAmSat FNPRM Comments at 9-10.

add questions to the Form concerning the licensing administration, route markets to be served (for DTH/DBS/DARS services, satellites licensed by non-WTO Members) and type of service to be provided, and requesting an ECO-Sat analysis, where necessary. We will also add a question regarding ownership information, which was inadvertently omitted in adopting Form 312, and is to be answered by *all* applicants, including U.S. applicants.

208. We will not incorporate into Form 312 a requirement that prospective suppliers file their ITU submissions for the satellite, as Loral suggests. As discussed, the ITU information does not include all the information required by Part 25 of the rules. If ITU coordination has been completed, however, we will not require the prospective foreign entrant to file *any* technical information.

209. Finally, we will not require an applicant to provide any additional ownership information regarding IGO affiliates, as PanAmSat advocates. As discussed above, the Commission has decided in this rulemaking to treat IGO affiliates the same as applicants from other countries.³⁸³ Parties, of course, may raise anticompetitive concerns regarding the grant of any application, which we will duly consider.

6. Global Mobile Personal Communications Systems

210. In the *Further Notice*, the Commission noted that the ITU World Telecommunications Policy Forum held in October 1996 adopted a draft Memorandum of Understanding (MoU) establishing a working group to develop arrangements to facilitate the free circulation of global mobile personal communications (GMPCS) terminals. The Commission asked whether these arrangements would impact the Commission's licensing process for mobile terminals.³⁸⁴

211. Lockheed Martin and Loral contend that adoption of the GMPCS MoU does not impact our licensing scheme for blanket licenses for mobile terminals accessing a non-U.S. system,³⁸⁵ although Lockheed Martin also suggests that it may be appropriate to consider whether the home market is a signatory to the Memorandum.³⁸⁶

212. We agree that the GMPCS MoU does not alter our blanket licensing scheme for mobile earth terminals. Indeed, the MoU recommends blanket or class licensing for GMPCS terminals. Nevertheless, signatories to the MoU retain the authority to regulate their

³⁸³ See *supra* Section III.B.1.d.

³⁸⁴ *Further Notice* at ¶ 59.

³⁸⁵ Loral FNPRM Comments at 28.

³⁸⁶ Lockheed Martin FNPRM Comments at 5.

telecommunications industries. Further, implementation of the arrangements or any of their provisions is voluntary.

D. Enforcement

213. Though the Commission did not specifically address enforcement issues in the *Notice* or *Further Notice*, GE Americom asserts that a "critical factor in the success of the Commission's policies in promoting competition" will be its ability to address competitive issues that may arise due to a foreign operator's failure to operate in accordance with technical and service requirements.³⁸⁷ GE Americom contends that we must monitor ongoing compliance with our rules and revoke any authorizations or impose conditions on authorizations as warranted.³⁸⁸ It suggests that the Commission provide a forum for consideration of these issues, but does not specify how such a forum should be administered.³⁸⁹ Similarly, Space Communications urges us to impose severe penalties on satellite operators violating any route limitations included in their U.S. earth station license.

214. We agree that it is paramount that all operators providing satellite service in the United States comply with Commission rules and policies applicable to that particular satellite service. In addition, we often attach specific conditions to licenses relating to operating requirements, system implementation requirements, and technical parameters. Entities violating the terms of their license are subject to administrative penalties, including monetary forfeitures and license revocation.³⁹⁰ We will continue our efforts to ensure compliance by all providers, whether U.S. or foreign, and to impose sanctions when appropriate. As always, we will fully explore any allegations of rule or license violations that are brought to our attention.

E. Consistency with GATS Obligations

Position of the Parties

215. A number of commenters question whether our proposed framework for evaluating requests to serve the U.S. via non-U.S. satellites is compatible with U.S. GATS obligations.³⁹¹ The European Commission argues that the proposed public interest test is not

³⁸⁷ GE Americom FNPRM Comments at 8.

³⁸⁸ *Id.*; GE Americom FNPRM Reply Comments at 8-9.

³⁸⁹ GE Americom FNPRM Comments at 8-9.

³⁹⁰ *See* 47 U.S.C. § 501; 47 CFR § 1.80.

³⁹¹ *See, e.g.*, ICO FNPRM Reply Comments at 5; Deutsche Telekom FNPRM Reply Comments at 2; European Commission FNPRM Reply Comments at 1-2.

compatible with GATS principles of objectivity, nondiscrimination, and transparency, nor with MFN obligations and market access commitments. The European Commission further states that the U.S. decision to conclude the WTO Basic Telecom Agreement indicates that WTO Members already satisfy U.S. public interest objectives and, therefore, the Commission should not apply a public interest test to WTO Members.³⁹² France Telecom notes that the broad public interest criteria violates the U.S. market access commitments.³⁹³ The Government of Japan states that the GATS does not allow application of a public interest test in a way that is inconsistent with the GATS. In addition, the Government of Japan urges the Commission to establish a period of time normally required to reach a decision concerning an application, as required by the Reference Paper.³⁹⁴

216. USTR asserts that the Commission can apply the public interest test and that no Members participating in the WTO basic telecom negotiations can claim surprise at its continued use.³⁹⁵ USTR argues that the United States did not give up its right to enforce domestic laws, regulations, and policies when it joined the WTO or agreed to the WTO Basic Telecom Agreement. According to USTR, the United States and other WTO Members remain entirely free to pursue legitimate policy objectives, such as the protection of competition, national security interests, law enforcement, foreign policy and trade concerns.³⁹⁶

Discussion

217. We conclude that application of the public interest test with respect to authorizations to access non-U.S. satellites is consistent with the GATS for several reasons.³⁹⁷ First, we find unpersuasive the European Commission's conclusion that the U.S. decision to conclude the WTO Basic Telecom Agreement alone satisfies our public interest analysis. The United States' decision to participate in the WTO Basic Telecom Agreement relates only to its trade obligations and does not replace our separate statutory mandate to determine that grant would otherwise serve the public interest, convenience and necessity. Second, we find unpersuasive arguments that considering the public interest when evaluating requests by non-

³⁹² European Commission FNPRM Reply Comments at 1-2.

³⁹³ France Telecom FNPRM Reply Comments at 2.

³⁹⁴ Government of Japan FNPRM Comments 4.

³⁹⁵ USTR Foreign Participation Comments at 9.

³⁹⁶ *Id.*

³⁹⁷ In reaching this conclusion, we rely on the expertise of USTR, which has primary responsibility for issuing and coordinating guidance on interpretation of U.S. trade obligations. See 19 U.S.C. § 2171(c)(1) (The USTR "shall issue and coordinate policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of international trade obligations considered under the auspices of the WTO.")

U.S. satellites violates the United States' national treatment and MFN obligations under the GATS. The Commission has applied a public interest analysis as part of its regulatory structure since the Communications Act was passed in 1934. In fact, consideration of the public interest is fundamental in carrying out the general powers of the Commission.³⁹⁸ We thus find unconvincing arguments that consideration of the public interest violates the U.S. national treatment or the MFN obligation.

218. Third, we find unconvincing the arguments of the European Commission and France Telecom that the public interest test violates the U.S. market access commitments. We note USTR's comment that the negotiating history of the GATS shows that Article XVI (Market Access) does not prohibit all domestic regulation of basic telecom services.³⁹⁹ Rather, Article XVI only prohibits Members from maintaining or adopting the types of unscheduled limitations and measures defined in GATS Article XVI. We find that because the public interest analysis is neither a quantitative nor an economic-needs based limitation set out in Article XVI, there is no need for the United States to have included the test as a limitation on its market access commitments in its Schedule of Specific Commitments.⁴⁰⁰

IV. ADMINISTRATIVE REQUIREMENTS

A. Regulatory Flexibility Act

219. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice and Further Notice*. The Commission's Final Regulatory Flexibility Analysis (FRFA), Appendix D of this *Report and Order*, conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).⁴⁰¹

B. Paperwork Reduction Act

220. This *Report and Order* contains new or modified information collections. A request for clearance of the information collections proposed in the *Further Notice* was

³⁹⁸ See 47 U.S.C. § 303.

³⁹⁹ See USTR Foreign Participation Comments at 7, n.13 (citing GATS Secretariat, "Initial Commitments in Trade Services: Explanatory Note," MTN.GNS/W/164 (September 3, 1994)).

⁴⁰⁰ *Id.* at 8.

⁴⁰¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act (CWAAA) of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

submitted to Office of Management and Budget (OMB) and approved on October 13, 1997.⁴⁰² The changes to the approved information collection adopted in this *Report and Order* will be submitted to OMB and will become effective upon approval by OMB.

V. CONCLUSION

221. In this *Report and Order*, we adopt a new standard for foreign participation in the U.S. satellite services market and implement the United States' obligations under the WTO Basic Telecom Agreement. The common sense rules and procedures we establish will provide opportunities for foreign entities to deliver satellite services in this country. The liberalized market conditions that will result from the WTO Basic Telecom Agreement will allow U.S. companies to enter previously closed foreign markets. These joint initiatives will benefit U.S. consumers by increasing the availability of various satellite services, providing more alternatives, reducing prices, and facilitating technological innovation. This new environment will encourage a more competitive satellite market in the United States, as well as spur development of broader, more global satellite systems. It will also foster greater opportunity for communications across national boundaries by making it easier for consumers worldwide to gain access to people, places, information, and ideas.

VI. ORDERING CLAUSES

222. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 303(r), 308, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303(r), 308, 309, and 310, the policies, rules and requirements discussed herein ARE ADOPTED and Part 25 of the Commission's rules, 47 CFR Part 25, IS AMENDED as set forth in Appendix C.

223. IT IS FURTHER ORDERED that authority is delegated to the Chief, International Bureau as specified herein, to effect the decisions as set forth above.

224. IT IS FURTHER ORDERED that the Commission's Office of Managing Director SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

225. IT IS FURTHER ORDERED that the amendments to Part 25 of the Commission's rules, 47 CFR Part 25, FCC Form 312 and the Commission's policies, rules and requirements established in this *Report and Order* shall take effect thirty days after publication in the Federal Register, or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507, whichever occurs later. The Commission will publish a

⁴⁰² See OMB No. 3060-0678.

notice, following publication of this *Report and Order* in the Federal Register, announcing the effective date of this *Order*. The Commission reserves the right to reconsider the effective date of this decision if the WTO Basic Telecom Agreement does not take effect on January 1, 1998.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Commenters on the *Notice of Proposed Rulemaking*

AirTouch Communications (AirTouch)
Alpha Star Television Network, Inc. (Alpha Star)
AMSC Subsidiary Corporation (AMSC)
AT&T Corp. (AT&T)
BT North America, Inc. (BTNA)
Cacaos (Cacaos)
Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Co., Inc., Turner Broadcasting System, Inc. (CC/Networks)
Charter Communications International, Inc. (Charter)
Columbia Communications Corporation (Columbia)
COMSAT Corporation (COMSAT)
DIRECTV, Inc.; DIRECTV International, Inc.; Hughes Communications Galaxy, Inc. (DirecTV)
GE American Communications, Inc. (GE Americom)
General Instrument Corporation (General Instrument)
Home Box Office (HBO)
ICO Global Communications (ICO)
INTELSAT
Japan Satellite Systems, Inc. (Japan Sat)
Keystone Communications Corporation (Keystone)
Kokusai Denshin Denwa Co., Ltd. (KDD)
L/Q Licensee, Inc. and Loral Space Communications, Ltd. (Loral)
Lockheed Martin Corporation (Lockheed Martin)
MCI Telecommunications Corporation (MCI)
Motorola Satellite Communications, Inc. and Iridium, Inc. (Motorola)
National Telecom Satellite Communications, Inc. (NATSAT)
Newcomb Communications, Inc. and Mobile Datacom Corporation (Newcomb)
Orbital Communications Corporation (OrbComm)
Orion Network Systems, Inc. (Orion)
PanAmSat Corporation (PanAmSat)
Space Communications Corporation of Tokyo, Japan⁴⁰³ (Space Communications)
Teledesic Corporation (Teledesic)
TMI Communications and Company, L.P. (TMI)
Transworld Communications (U.S.A.), Inc. (Transworld)
TRW Inc. (TRW)
Western Tele-Communications, Inc. (WTCI)
WorldCom, Inc. (WorldCom)

⁴⁰³ Motion for Late-filed initial Comments and Comments received July 31, 1996.

Reply Commenters on the *Notice of Proposed Rulemaking*

AirTouch Communications
AMSC Subsidiary Corporation
Associated Group Inc. (Associated)
AT&T Corp.
BT North America, Inc.
Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Co., Inc., Turner Broadcasting Systems, Inc.
Charter Communications International, Inc.
Columbia Communications Corporation
COMSAT Corporation
DIRECTV, Inc.
Embassy of Japan (Government of Japan)
GE American Communications, Inc.
GTE Airphone Incorporated (GTE)
ICO Global Communications
INTELSAT
Lockheed Martin Corporation
Loral Space & Communications Ltd.
MCI Telecommunications Corporation
Motion Picture Association of America, Inc. (MPAA)
Motorola Satellite Communications, Inc. and Iridium LLC
National Telecom Satellite Communications, Inc.
Newcomb Communications, Inc. and Mobile Datacom Corporation
News Corporation Limited (News Corp.)
National Telecommunications and Information Administration (NTIA)
Orion Network Systems, Inc.
PanAmSat Corporation
Teledesic Corporation
TelQuest Ventures, Inc. (TelQuest)
Telesat Canada (Telesat)
TMI Communications and Company, LP (TMI)
Transworld Communications (U.S.A.) Inc.
TRW Inc.
U.S. Department of State (State)
Western Tele-Communications, Inc.

APPENDIX B

Commenters on the *Further Notice of Proposed Rulemaking*

ABC, Inc., CBS Inc., National Broadcasting Company, Inc., and Turner Broadcasting Systems, Inc. (Networks)
AirTouch Communications, Inc.
AT&T Corporation
AMSC Subsidiary Corporation
BT North America, Inc.
Columbia Communications Corporation
COMSAT Corporation
Embassy of Japan
GE American Communications, Inc.
Globecast North America Inc.
Hughes Electronics Corporation (Hughes)
ICO Global Communications
Lockheed Martin Corporation
Loral Space & Communications Ltd. and L/Q Licensee, Inc.
Morality in the Media, Inc. (Morality)
Motorola Satellite Communications, Inc. and Iridium LLC
Orion Network System, Inc.
PanAmSat Corporation
QUALCOMM Inc. (Qualcomm)
Secretary of Defense (DOD)
Skybridge LLC (Skybridge)
Teledesic Corporation
Telesat Canada
TMI Communications and Company, LP
TRW Inc.
UTC
Winstar Communication, Inc. (Winstar)

Reply Commenters on the *Further Notice of Proposed Rulemaking*

AMSC Subsidiary Corporation
Columbia Communications Corporation
COMSAT Corporation
Deutsche Telekom AG and Deutsche Telekom, Inc. (Deutsche Telekom)
European Commission (European Commission)
France Telecom (France Telecom)
GE American Communications, Inc.
Hughes Electronics Corporation
ICO Global Communications
Japan Satellite Systems, Inc.
Lockheed Martin Corporation⁴⁰⁴
Motion Picture Association of American, Inc.
Orion Network Systems, Inc.
Panamsat Corporation
Space Communications Corporation
TMI Communications and Company, Limited Partnership
Office of the U.S. Trade Representative (USTR)

⁴⁰⁴ Filed Motion to Leave to File Late Comments
24191

APPENDIX C

Rule Changes to 47 C.F.R. Part 25 of the Commission's Rules

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

Authority: Secs. 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

PART 25-SATELLITE COMMUNICATIONS

2. The Table of Contents for Part 25 is amended to read as follows:

* * * * *

EARTH STATIONS

- 25.130 Filing requirements for transmitting earth stations.
- 25.131 Filing requirements for receive-only earth stations.
- 25.132 Verification of earth station antenna performance standards.
- 25.133 Period of construction; certification of commencement of operation.
- 25.134 Licensing Provisions of Very Small Aperture Terminal (VSAT) Networks.
- 25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.
- 25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service.
- 25.137 Application requirements for earth stations operating with non-U.S. licensed space stations.

* * *

* * * * *

3. Section 25.113 is amended by revising the first sentence of paragraph (b) to read as follows:

§ 25.113 Construction Permits

* * * * *

(b) Construction permits are not required for satellite earth stations that operate with U.S.-licensed or non-U.S. licensed space stations. * * *

* * * * *

4. Section 25.115 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 25.115 Applications for earth station authorizations

* * * * *

(c) Large Networks of Small Antennas operating in the 12/14 GHz frequency bands with U.S.-licensed or non-U.S. licensed satellites for domestic services. * * *

* * * * *

5. Section 25.130 is amended by revising the first sentence of paragraph (d) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

* * * * *

(d) Transmissions of signals or programming to non-U.S. licensed satellites, and to and/or from foreign points by means of U.S.-licensed fixed satellites may be subject to restrictions as a result of international agreements or treaties. * * *

* * * * *

6. Section 25.131 is amended by revising paragraphs (b) and (j) to read as follows:

§ 25.131 Filing requirements for receive-only earth stations.

* * * * *

(b) Except as provided in paragraph (j) of this section, receive-only earth stations in the fixed-satellite service that operate with U.S.-licensed satellites may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in bands shared co-equally with the fixed service in accordance with the procedures of §§ 25.203 and 25.251-25.256 of this part.

* * * * *

(j) Receive-only earth stations operating with non-U.S. licensed space stations shall file an FCC Form 312 requesting a license or modification to operate such station. Receive-only earth stations used to receive INTELNET I service from INTELSAT space stations need not file for licenses. See Deregulation of Receive-Only Satellite Earth Stations Operating with

the INTELSAT Global Communications Satellite System, Declaratory Ruling, RM No. 4845, FCC 86-214 (released May 19, 1986).

7. A new Section 25.137 is added to read as follows:

§ 25.137 Application requirements for earth stations operating with non-U.S. licensed space stations

(a) Earth station applicants or entities filing a "letter of intent" requesting authority to operate with a non-U.S. licensed space station to serve the United States must attach an exhibit with their FCC Form 312 application with information demonstrating that U.S.-licensed satellite systems have effective competitive opportunities to provide analogous services in (1) the country in which the non-U.S. licensed space station is licensed; and (2) all countries in which communications with the U.S. earth station will originate or terminate. The applicant bears the burden of showing that there are no practical or legal constraints that limit or prevent access of the U.S. satellite system in the relevant foreign markets. The exhibit required by this paragraph must also include a statement of why grant of the application is in the public interest. This paragraph shall not apply with respect to requests for authority to operate using a non-U.S. licensed satellite that is licensed by or seeking a license from a country that is a member of the World Trade Organization for services covered under the World Trade Organization Basic Telecommunications Agreement.

(b) Earth station applicants, or entities filing a "letter of intent," requesting authority to operate with a non-U.S. licensed space station must attach to their FCC Form 312 an exhibit providing legal, financial, and technical information for the non-U.S. licensed space station in accordance with Part 25 and Part 100 of this Chapter. If the non-U.S. licensed space station is in orbit and operating, the applicant need not include the financial information specified in §§ 25.114(c)(17) and (c)(18) of this part. If the international coordination process for the non-U.S. licensed space station has been completed, the applicant need not include the technical information specified in §§ 25.114(c)(5-11) and (c)(14) of this part, unless the technical characteristics differ from the characteristics established in that process.

(c) A non-U.S. licensed satellite system seeking to serve the United States can be considered contemporaneously with other U.S. satellite systems if it is (i) in orbit and operating; (ii) has a license from another administration; or (iii) has been submitted for coordination to the International Telecommunication Union.

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS-AMENDMENT OF THE COMMISSION'S REGULATORY POLICIES TO ALLOW NON-U.S. LICENSED SPACE STATIONS TO PROVIDE DOMESTIC AND INTERNATIONAL SATELLITE SERVICES IN THE UNITED STATES (International Satellite Services Order)

1. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), the Federal Communications Commission ("Commission") prepared an Initial Regulatory Flexibility Analysis (IRFA) in the *Notice of Proposed Rulemaking (Notice)* in IB Docket No. 96-111.¹ After the conclusion of the World Trade Organization (WTO) Agreement on Basic Telecommunications Services (WTO Basic Telecom Agreement), the Commission released the *Further Notice of Proposed Rule Making (Further Notice)* requesting comment on the proposals in the *Further Notice*, including the IRFA.² The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Report and Order* conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).³

I. Need for, and Objectives of, the International Satellite Services Report and Order:

2. In this *Report and Order*, the Commission promulgates rules for non-U.S. licensed satellites to provide satellite services in the United States. This action will advance the growth of global satellite services and create greater competition in the U.S. satellite market. Enhanced competition in the U.S. market will benefit U.S. consumers, including small businesses, by increasing the availability of various satellite services, providing more alternatives in the selection of communications services, reducing prices, and facilitating technological innovation. The Commission adopts these rules in part to reflect the liberalized market environment that will result from the WTO Basic Telecom Agreement. Specifically, the Commission adopts an open entry standard for applicants seeking to access satellite systems from WTO Members providing satellite services covered by the U.S. Schedule of Commitments under the WTO Basic Telecom Agreement (Fixed Satellite Services and Mobile

¹ *In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Notice of Proposed Rulemaking, 11 FCC Rcd 18178 (1996) (*Notice*).

² *In the Matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Further Notice of Proposed Rulemaking, FCC 97-252 (released July 18, 1997) (*Further Notice*).

³ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract with America Advancement Act (CWAAA) of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

Satellite Services(MSS)).⁴ The Commission presumes that entry will be competitive in these cases. The Commission reserves the right, however, to attach conditions to a grant of authority or, in exceptional circumstances, where conditions may not adequately constrain the potential for anticompetitive harm in the U.S. market, to deny an application. In deciding whether to grant non-WTO country satellites access to the U.S. market or whether to allow any non-U.S. satellite to provide non-covered services in the United States, the Commission adopts the "ECO-Sat test." This test requires that U.S. satellite operators have "effective competitive opportunities" in the foreign market before allowing a satellite licensed by that country access into the United States.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:

3. No comments were filed in direct response to the questions posed in the IRFA in either the *Notice* or the *Further Notice*. In reply comments to the *Notice*, however, NATSAT argues that the Commission should not apply the ECO-Sat test to applications filed on or before July 15, 1996 by "designated entities" to resell MSS service in the United States.⁵ It claims that such an exemption would be consistent with the directive Section 309(j) to ensure that small businesses and minority entrepreneurs have the chance to participate in the provision of spectrum-based services. In the *Report and Order*, the Commission does not adopt an ECO-Sat test with respect to WTO-Member satellites providing WTO-covered services. Thus, small entities may access a large percentage of non-U.S. satellites without conducting an ECO-Sat analysis. Moreover, an ECO-Sat analysis is a minimal burden when compared to the possibility that unrestricted entry by foreign-licensed satellite systems would distort competition in the United States market.

III. Description and Estimate of the Number of Small Entities Subject to the Rules:

4. The Commission has not developed its own definition of "small entity" for purposes of licensing satellite-delivered services. Accordingly, we rely on the definition of "small entity" provided under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified.⁶ A "small entity" under these SBA rules is defined as an entity with \$11.0 million or less in annual receipts.

⁴ Non-covered services are those not contained in the U.S. Schedule of Commitments in the WTO Basic Telecom Agreement -- Direct to Home (DTH), Direct Broadcast Service (DBS) or Digital Audio Service (DARS).

⁵ NATSAT NPRM Reply Comments at 11-15 citing 47 U.S.C. § 309(j).

⁶ 1987 Standard Industrial Classification Manual; 13 C.F.R. Part 121.

IV. Summary of Projected Reporting, Record Keeping and Other Compliance Requirements:

5. This *Report and Order* requires foreign-licensed systems serving the United States to comply with the same public interest standards that the Commission applies to U.S. satellites. First, foreign-licensed satellite systems must comply with the same technical requirements as a U.S.-licensed satellite system. Without examining its technical compatibility with U.S.-licensed satellites, a foreign-licensed satellite system may cause unacceptable interference with U.S. systems and possible service disruptions to customers.⁷ Second, the Commission requires foreign-satellite system applicants to comply with our financial rules, established under Section 308(b) of the Communications Act.⁸ Reserving orbit locations or spectrum for future satellites without examining whether the operator is financially qualified to build a system, which often costs hundreds of millions of dollars, could block entry by other U.S. or foreign companies that have the financial capability to proceed, ultimately delaying service to the public. Third, foreign-licensed satellite systems must comply with the Commission's legal qualifications consistent with Sections 308 and 309 of the Communications Act.⁹ The purpose of requiring compliance with legal requirements is to ensure that entities providing satellite services in the United States will abide by Commission rules. For example, certain information may provide relevant indicia of compliance. Violations of law by an applicant, particularly those relating to credibility, may be evidence that it will not comply with Commission rules. Thus, it is vital that the Commission obtain assurance that an applicant will follow the rules that the Commission has established over the years to maximize the development of efficient, compatible, and innovative satellite systems.

V. Significant Alternatives and Steps Taken By Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:

6. The Commission will apply the same rules to foreign-licensed systems as have been applied to U.S. licensed systems. This approach will not impose any additional burdens on foreign-licensed satellite systems, small or large. Earth station operators seeking to access a non-U.S. satellite will be required to provide the same information regarding the satellite that U.S. satellite applicants must provide. This information is needed to ensure that transmissions from the space station into the U.S. do not cause technical interference into existing U.S. operations and that other Commission public interest objectives are met. The Commission expects, however, that the satellite information will be provided by the satellite operator to the earth station applicant because of their mutual business objectives. Thus, there

⁷ *Report and Order* at Section III.B.3.b.

⁸ *Id.*

⁹ *Id.*

will be no economic impact on small businesses because there are no additional burdens being imposed. Certain information will not be required. First, where the international technical coordination process has been completed between the United States and the foreign satellite, additional technical information about that foreign satellite is not necessary. This is because the United States and the relevant foreign administration exchange extensive technical data about their respective systems during the course of the bilateral negotiations that lead up to a coordination agreement. This technical information is sufficient for us to determine whether the foreign satellite complies with Commission technical rules. The Commission finds that this new framework will benefit small businesses because earth station entities will have greater choice of space stations to access and opportunity to benefit from the other advantages of a more competitive market, such as reduced prices. In addition, small, local programmers will have access to a more competitive selection of satellite service providers. In this regard, our measures will advance the small business goals of Section 257 of the 1996 Act.

7. Report to Congress: The Commission will send a copy of the *Report and Order* including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A summary of the *Report and Order* and this FRFA will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**INSTRUCTIONS FOR COMPLETION OF FCC FORM 312
APPLICATION FOR SATELLITE SPACE AND EARTH STATION AUTHORIZATIONS**

Information and Instructions

Purpose of Form

FCC Form 312 is used to apply for all authorizations relating to satellite earth and space station facilities, and to notify the Commission of changes to these facilities in cases where prior Commission approval is not required. Specifically, applicants should use FCC Form 312 in the following cases: (1) when applying for a license for a new earth or space station(s); (2) when applying for registration of a domestic receive-only earth station(s); (3) when applying for a modification to a licensed earth or space station(s); (4) when seeking Commission consent to an assignment or transfer of control of a licensed earth or space station(s); (5) when notifying the Commission of a minor modification to a licensed earth or space station(s); (6) when notifying the Commission of an assignment or transfer of control of a registered domestic receive-only earth station(s); and (7) when filing an amendment to a pending earth or space station application(s). The purpose of this form is to collect data and other information relating to satellite space and earth stations to assist the FCC in determining whether the public interest would be served by a grant of the requested authorization.

Applicable Rules and Regulations

Before the application is prepared, the applicant should refer to Parts 1 and 25 of the Rules and Regulations of the Commission, (Title 47, Code of Federal Regulations (CFR), Parts 1 and 25). Copies of the FCC Rules may be purchased from the Superintendent of Documents, Mail Stop: SSOP, U.S. Government Printing Office, Washington, DC 20402-9328. Part 1 contains rules regarding fee requirements. See also the International and Satellite Services Fee Filing Guide for specific fee information. Part 25 may require information to be filed with an application in addition to that specified in the application form. Applicant should make every effort to file a complete application in compliance with the Rules. Failure to do so can result in rejection or return of the application or a delay in the processing of the application. Use additional sheets only where necessary. All additional sheets must contain the applicant's name and the number of questions to which it responds.

Introduction

FCC Form 312 is a multi-part form comprised of a Main Form and schedules. Each application must contain a completed Main Form in addition to any required schedules in order to receive consideration.

The purpose of the **mandatory** Main Form is to (1) obtain information sufficient to identify the applicant; (2) establish the applicant's basic eligibility and qualifications; (3) classify the filing; and (4) identify the nature of the proposed service or request. The Main Form also contains required certifications and signature block(s).

Schedules

There are two schedules - Schedule A and Schedule B - that are used in conjunction with the mandatory Main Form.

SCHEDULE A is to be completed when:

- Applying for Consent to Assignment of License of both space and earth stations
- Applying for Consent to Transfer of Control of both space and earth stations
- Notifying the FCC of Assignment or Transfer of Control of Receive-Only earth station Registration

SCHEDULE B is to be completed when:

- Applying for a License for a Transmit and/or Receive Earth Stations
- Applying for Registration of Domestic Receive-only Earth Stations
- Applying for Blanket License for New Earth Station System, including VSAT and Mobile Satellite Service Systems
- Amending a pending earth or space station Application
- Applying for a Modification of a granted earth station, VSAT, or space station license
- Applying for a Modification of a granted Receive-only earth station Registration
- Notifying FCC of a Minor Modification of a granted earth station or VSAT license

For Assistance

For additional information about Form 312 contact the FCC Consumer Assistance Office at (202) 418-0220. Information is also available on the FCC's internet site at <http://www.fcc.gov>. Examples of completed Form 312 applications are available on the FCC's internet site. The International and Satellite Services Fee Filing Guide is available on the International Bureau's Home Page at the above internet address.

Incorporation by Reference

Reference documents, exhibits, or other lengthy showings already on file with the FCC may be referred to in the application without further submission only if: (a) the information is current and accurate in all significant respects and (b) the reference states specifically where the previously filed information can be found (*i.e.*, station call sign and application file number, title of proceeding, docket number or legal citations), including exhibit and page references. If either of these criterion is not met, the reference documents must accompany the application.

GENERAL INSTRUCTIONS

Current Information

Information filed with the FCC must be kept current. The applicant should notify the FCC regarding any substantial and significant changes in the facts as they appear in the application. See 47 CFR 1.65.

Waiver Requests

Requests for waivers must contain a statement of reasons sufficient to justify a waiver and must be included as "Exhibit D" to the Main Form. For each rule waiver desired, a separate request with the required showing identifying the specific rule or policy for which the waiver is requested, must be made.

Exhibits

Each document required to be filed as an exhibit should be current as of the date of filing. Each exhibit must be identified by a letter. Each page of each exhibit must be identified by exhibit and page number using the following format: Exhibit A, Page 2 of 3. If material is to be incorporated by reference within the exhibit, see the instruction on incorporation by reference. If interference studies, frequency coordination reports, radiation hazard reports, environmental impact statements, etc., are required by rule, include them as exhibits. All exhibits must be consecutively designated using either letters or numbers. All exhibits must be listed on the exhibit chart, Main Form, page 4.

Filing of Applications

An original and two copies of the completed application(s) for earth station(s) and an original and nine copies of the completed application(s) for space station(s), as set forth in Part 25, must be submitted along with the correct filing fee amount. The original application and the duplicate thereof must be clearly marked as such. **DO NOT SEND CASH.** Payment can generally be made by check, bank draft, credit card, money order, or by pre-arrangement. For detailed information regarding fees refer to the International and Satellite Services Fee Filing Guide.

Mailing of Applications

Completed applications concerning earth stations should be mailed to:

Federal Communications Commission
International Bureau-Earth Station
P.O. Box 358160
Pittsburgh, Pennsylvania 15251-5160

Completed applications concerning space stations should be mailed to:

Federal Communications Commission
International Bureau-Space Station
P.O. Box 358210
Pittsburgh, Pennsylvania 15251-5210

When delivering feeable applications by hand or by courier, use the following address:

Federal Communications Commission
c/o Mellon Bank
Three Mellon Bank Center
535 William Penn Way
27th Floor, Room 153-2713
Pittsburgh, Pennsylvania
(Attn: Wholesale Lockbox Shift Supervisor).

Applications received before midnight on a normal business day will receive that day's date as the receipt date. Deliveries made after midnight on Fridays will not be "officially" receipted until the next Monday. Applications received on weekends and government holidays are dated the next regular business day. See the FCC International and Satellite Services Fee Filing Guide for fee information.

Additional Information

All information provided in this form will be available for public inspection. If information requested on the form is not provided, processing of the application may be delayed or the application may be returned without action pursuant to FCC rules.

Paperwork Reduction and Privacy Act Notice

The solicitation of personal information requested in this form is authorized by the Communications Act of 1934, as amended, and the Telecommunications Act of 1996, Pub. L. 104-104 (February 8, 1996). The FCC will use the information provided in this form to determine whether grant of this application is in the public interest. In reaching that determination, or for law enforcement purposes, it may become necessary to refer personal information contained in this form to another government agency. In addition, all information provided in this form will be available for public inspection. If information requested on this form is not provided, processing of the application may be delayed or the application may be returned without action pursuant to the Commission rules. Your response is required to obtain the requested authority.

Public reporting burden for this collection is estimated to be 11 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Federal Communications Commission, AMD-Performance Evaluation and Records Management Branch, Washington, D.C. 20554, Paperwork Reduction Project 3060-0678. **[Do not send completed application forms to this address.]** Applicant is not required to respond to any collection of information that does not display a valid OMB Control Number.

The foregoing Notice is required by the Privacy Act of 1974, Pub.L. 93-597, December 31, 1974, 5 U.S.C. 552a(e)(3), and the Paperwork Reduction Act of 1995, Pub.L. 104-13, May 22, 1995, 44 U.S.C. 3506(c)(1)(B), 5 CFR 1320.5(b).

Miscellaneous Information Regarding Specific Types of Filings

Space Station Applications. All space station applications should be filed using Form 312 Main Form. Applications for assignments and transfers of control of space station licenses should also include Schedule A. Only the Main Form is needed to submit ownership information. All additional required space station information such as business plans, technical descriptions, etc. should be provided in a narrative form attached to the Form 312 Main Form. See Part 25.140, et al., of the FCC's Rules and Regulations concerning the filing requirements for space station applications.

Earth Station Amendments. All amendments to pending earth station applications should include FCC Form 312 Main Form and Schedule B. Applicants may incorporate by reference those data items not being changed. (See instructions for incorporation by reference.)

Earth Station Modifications. All modifications to existing earth station authorizations should include FCC Form 312 Main Form and Schedule B. Applicants may incorporate by reference those data items not being changed. (See instructions for incorporation by reference.) If you presently hold domestic, international, and/or transborder authorizations for the same earth station (call sign) that were previously granted under different file numbers, be sure to include the composite data from all of these previous separate authorizations. Only one modified authorization will be issued that encompasses all of the previous earth station authorizations.

VSAT Network Applications. Applications for blanket licenses for VSAT networks may be filed in a single consolidated network application using Form 312. Separate radio station authorizations will be issued to each hub station and for each different size or type of remote unit in the network. The application for a new VSAT network should include a single Main Form and a Schedule B which includes the complete data for all parts of the VSAT network. Provide a separate Schedule B, Page 1 for each part of the network, including one sheet for each hub station and one sheet for each remote unit variant. Include all hub and remote antennas, frequency coordination limits, and particulars of operation on Schedule B, Pages 2-4. Be sure to identify the associated site-id and antenna-id for each row of data. Attach continuation sheets for Pages 2-4 as needed. Provide a separate Schedule B, Page 5 for each hub site and remote variant. Be sure to identify the site-id on each Page 5.

Modifications to a VSAT network authorization should include only the data relevant to the portion of the network that is being revised. For example, if the modification affects only the hub station, do not include data relevant to the remote units (see Earth Station Modifications section above).

SPECIFIC INSTRUCTIONS FOR THE MAIN FORM

APPLICANT INFORMATION

Items 1-16. These items identify the applicant. If an authorization is granted, the information provided will become the licensee's name, address and telephone numbers of record, and the authorization will be sent to this address. Applicants must provide a current and valid mailing address. Failure to respond to FCC correspondence sent to the address of record may result in dismissal of an application, liability for forfeiture or revocation of an authorization. These items also identify the contact representative (e.g., a person at the headquarter's office of the applicant, the law firm of the applicant, or the company that prepared or submitted the application on behalf of the applicant).

CLASSIFICATION OF FILING

Item 17a indicates whether the filing relates to an earth or a space station application. Do not combine both earth and space station actions within a single application -- check only one box. For example, file two separate applications for an Assignment of License that covers both the space segment and earth segment of a satellite system.

Item 17b indicates the type of application that is being filed. Do not combine different types of actions into a single application -- check only one box. For example, to modify and assign the authorization for a single station, you must file two separate applications. Schedule A must be attached to the Main Form if you have checked box 17b5 or 17b6. Schedule B must be attached to the Main Form if you have checked box 17b1, 17b2, 17b3 (if earth station), 17b4, or 17b7.

Item 18 If this filing is in reference to an existing station, provide the station's call sign. If this filing is in reference to multiple stations provide the call sign of the lead station.

Item 19 Where a pending application is to be amended, enter the date that the original pending application was filed. Also provide the file number of that original pending application, if known.

TYPE OF SERVICE

Item 20 This item seeks information about the nature of service requested.

Item 21 This item indicates whether or not the applicant will operate this station as a common carrier.

Item 22 All earth station applications must identify whether or not U.S. licensed satellites are used. Check both boxes if this earth station will operate with both U.S. and foreign licensed satellites. If the earth station will operate with a non-U.S. licensed satellite, be sure to complete Item B3 on Schedule B.

Item 23 Only those applicants providing INTERNATIONAL COMMON CARRIER service need to indicate whether or not this facility is connected to the Public Switched Network. Appropriate Section 214 filings are required. See 47 CFR Part 63 of the Commission Rules.

Item 24 The proposed frequency band(s) are specified in this item. All C-band (4/6 GHz) earth stations require successful prior radio frequency coordination for both Fixed and Temporary-Fixed (including Satellite News-Gathering) operations. See Items B6, B11, and B12 on Schedule B.

TYPE OF STATION

Item 25 This item identifies the class of station to be placed in service. Mark only one box. Transportable Satellite News-Gathering (SNG) trucks fall under the category "Temporary-Fixed Earth Station."

Item 26 This item identifies whether the earth station transmits and/or receives.

PURPOSE OF MODIFICATION OR AMENDMENT

Note: An application that revises the data on a previous application that has NOT YET BEEN GRANTED is an "Amendment", whereas an application that revises the data on a previously GRANTED application (license or registration) is a "Modification". Existing authorizations are "modified" while pending applications are "amended".

Item 27 Purpose of the proposed modification or amendment highlights the various types of modifications or amendments generally requested. Mark all that apply. Provide the revised earth station data on Schedule B (see Earth Station Modifications section above).

ENVIRONMENTAL POLICY

Item 28 This item is required for compliance with the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321-4335. See also Part 1, Subpart I of the FCC rules (47 CFR 1.1301-1.1319). Examples of facilities that may have a significant effect on the environment include:

- o an antenna structure located in a residential area (as defined by applicable zoning laws) which will utilize high intensity aviation obstruction lighting
- o a facility located in an officially designated wilderness area, wildlife preserve or floodplain
- o a facility that affects a site significant in American history
- o a facility, the construction of which involves extensive changes in surface features

A Radiation Hazard Study must accompany all applications for new transmitting facilities, major modifications, and major amendments as Exhibit B. For information on preparing this study, consult OET Bulletin 65.

ALIEN OWNERSHIP

Items 29-34 These items request information that will enable the FCC to determine whether an applicant is eligible under Section 310 of the Communications Act of 1934, as amended, to hold a station license. Earth station applicants not proposing to provide broadcast, common carrier, aeronautical en route or aeronautical fixed radio station services are not required to respond to Items 30-34.

BASIC QUALIFICATIONS

Items 35-42 These items request information that enables the FCC to determine whether an applicant is basically qualified to hold an FCC authorization. Item 40 applies only to applicants for Space Station authorizations.

Item 43 Provide a summary of the nature of the application and services to be provided.

CERTIFICATION

Items 44-48 To be acceptable for filing, applications, amendments, modifications and registrations must be signed in accordance with Part I of the FCC rules. The signer must be a person authorized to sign the application. Paper originals of applications must bear an original signature. Neither rubber-stamped nor photocopied signatures are acceptable.

SPECIFIC INSTRUCTIONS FOR SCHEDULE A

Consent to Assignment of License/Transfer of Control
Notification of Assignment or Transfer of Control of
Receive-Only Registration

PURPOSE OF FILING

Schedule A and the Main Form must be completed when requesting Consent to Assignment of License or Transfer of Control. Schedule A and the Main Form must be used when notifying the FCC of a completed Assignment of Receive-Only Registration or of a completed Transfer of Control of Receive-Only Registration. The Main Form and Schedule A collects information about the parties to the transaction in order to determine whether the requested consent, governed by 47 CFR Part 25, serves the public interest. The Main Form is to be completed by the prospective licensee or registrant in the case of an assignment (assignee) or the new controlling entity in the case of a transfer of control (transferee). Schedule A is to be completed by all involved parties.

Items A1-A9 and A22-A25 must be completed by the current licensee or registrant.

Items A10-A14 and A26-A29 must be completed by the entity assigning or transferring the license or registration (assignor/transferrer) if different from the licensee or registrant.

Items A15-A21 and A30-A33 must be completed by the assignee/transferee.

SPECIFIC INSTRUCTIONS FOR SCHEDULE B

Technical and Operational Description of Earth Station(s)

PURPOSE OF FILING

Schedule B is used for all earth station filings that do not involve Assignments or Transfers of Control. Schedule B and the Main Form must be completed when filing for both licenses and registrations for all new earth stations, all amendments to pending earth station applications, and all modifications to existing earth station authorizations. This includes VSAT networks. Schedule B collects technical and operational information relevant to the earth station.

LOCATION OF EARTH STATION SITE

Item B1a-B11 identifies the location of the fixed earth station both by address and geographic coordinates; and the area of operation for temporary-fixed, mobile, and VSAT remote earth stations. For fixed earth stations, indicate whether the geographic coordinates are based on the North American Datum (NAD) of 1927 or 1983. Until further notice, you must provide the geographic coordinates based upon NAD-27. See FCC Public Notice, DA 92-1188 (released September 1, 1992).

Item B1b should be completed only when the application involves a VSAT network. The site identifier is used to identify the various parts of the VSAT network. The applicant should assign a unique identifier to each hub station and each remote variant that is part of a VSAT network (e.g., "HUB", "REMOTE1", "REMOTE2", etc.). Each hub station and each remote variant of a VSAT network must have its own completed Page 1 of Schedule B. The Points of Communications (Item B2) and Destination Points (Item B3) must be completed individually for each hub station and each remote variant.

POINTS OF COMMUNICATIONS

Item B2 This is the list of satellites with which the earth station will communicate. If the earth station will communicate only with U.S. licensed satellites, then "ALSAT" is the notation needed under item B2. If, however, the earth station will operate with satellites licensed by countries other than the U.S.A., each and every non-U.S. licensed satellite must be individually listed here. If the earth station will operate with both U.S. licensed satellites and non-U.S. licensed satellites, include the notation "ALSAT" to cover the U.S. licensed satellites and then list each non-U.S. licensed satellite individually.

Item B6, Frequency Coordination Limits, must also be completed to indicate the satellite orbital arc range and frequency band limits over which the satellites will operate. This applies to both U.S. licensed and non-U.S. licensed satellite systems. Any authorization issued for the earth station will be valid only in the orbital arc range and frequency band range specified in Item B6.

DESTINATION POINTS

Item B3 This is a list of all countries that the earth station will provide service to using non-U.S. licensed satellites. The countries for each non-U.S. licensed satellite must be listed separately. The ITU 3-letter country codes as specified in Table B1 to the Preface of the ITU's International Frequency List may be used to identify the countries to which service will be provided.

EARTH STATION ANTENNA FACILITIES

Item B4a Site IDs should be provided only for applications relating to VSAT networks. Use the Site Identifier (Item B1b) to identify the portion of the VSAT network that each antenna belongs to.

Item B4b Applicants should assign a unique identifying number or name to each antenna. This ID should be used throughout Schedule B when referring to the frequencies, emissions, heights, satellite arcs, etc., that are associated with each antenna that comprises the earth station.

Item B4c Identify the number of units of each make and model of antenna installed at this earth station. For VSAT networks, identify the total number of units for each remote segment.

Item B4d-B4e Provide the manufacturer and model number of the antenna.

Item B4f Provide the diameter of the antenna for circular aperture antennas. For elliptical aperture antennas, provide the major and minor axes diameters of the antenna and its equivalent circular electrical diameter. All units must be provided in meters.

Item B4g Provide the antenna gain and reference frequency for both the transmit and receive frequency bands. The antenna gain should be characteristic of the center frequency of the frequency band in which it operates.

ANTENNA HEIGHTS AND MAXIMUM POWER LIMITS

Item B5a See item B4b above.

Item B5b For earth station antennas that will be mounted on towers or are otherwise subject to the required FCC prior tower registration, provide the Tower ID number as listed in the FCC's Tower Database. See 47 CFR Part 17 for information concerning prior registration of towers.

Item B5c-B5d Enter the maximum overall height to the top of the antenna structure with respect to ground level and mean sea level. All units must be in meters. See Part 17 of the FCC Rules.

Item B5e-B5f If the antenna is located on a building or other structure, provide the height of the building above ground level, and the maximum height of the antenna above the top of the structure on which the antenna is located. Also attach a sketch of the site and other information required by 47 CFR Part 17.

Item B5g-B5h If the antenna transmits, provide the total input power (in Watts) at the antenna flange and the aggregate output EIRP (in dBW) for all r.f. carriers. These powers must be consistent with those provided in the Radiation Hazard Study in Exhibit B.

FREQUENCY COORDINATION LIMITS

Item B6a See item B4b above.

Item B6b Provide the lower and upper frequency band limits over which the earth station has been frequency coordinated, or over which the earth station will operate.

Item B6c-B6d Provide the eastern most and western most geostationary satellite arc limits over which the earth station has been frequency coordinated, or over which the earth station will operate. For non-geostationary satellites, provide the notation "NON-GEO".

Item B6e-B6f Provide the elevation angle to the eastern most and western most geostationary satellite orbital arc limits. For non-geostationary satellites, provide the minimum elevation angle at which the earth station will operate.

Item B6g-B6h Provide the azimuth angle relative to true north to the eastern most and western most geostationary satellite orbital arc limits. For non-geostationary satellites, provide the maximum azimuthal angles at which the earth station will operate (e.g., 0-360 degrees).

Item B6i If the earth station transmits in this frequency band, provide the maximum EIRP density toward the horizon (in dBW/4kHz).

PARTICULARS OF OPERATION

Item B7a See item B4b above.

Item B7b Enter the lower and upper frequency limits of the frequency band to which this emission is limited. Alternatively, provide the single center or carrier frequency of the emission.

Item B7c Indicate with a "T" or "R" whether the earth station transmits or receives this emission in this frequency band.

Item B7d Indicate the antenna polarization used with this emission.

Item B7e Enter the emission designator for the emission. (For proper emission designator format, see Section 2.201 of the FCC Rules.)

Item B7f For transmit mode, provide the maximum EIRP, in dBW, for each r.f. carrier of the emission.

Item B7g For transmit mode, provide the maximum EIRP Density, in dBW/4kHz, for each r.f. carrier of the emission.

Item B7h Give a brief description of both the modulation and services provided by this emission. Examples of modulation include QPSK, BPSK, SCPC, etc. Examples of services include "video", "data", "voice", etc.

Items B8-B13 Generally

If the application is for a VSAT network, attach an individual Schedule B, Page 5 for each hub station and each different size or type of remote unit. Items B8-B13 require response with respect to each portion of the VSAT network. Identify the VSAT site by using the Site Identifier from Item B1b. For all other earth station applications not involving VSAT networks, respond to Items B8-B13 with respect to the earth station as a whole (*i.e.*, with respect to all antennas that comprise the earth station).

Item B8-B9 These questions indicate compliance with the antenna sidelobe standard specified in 25.209 of the FCC Rules. FSS operations using satellites located in the geostationary satellite orbit must comply with the more stringent standard (item B8), or provide a technical analysis showing that this operation is compatible with two-degree spacing policy. Earth stations operating with non-geostationary satellites (MSS, etc.) or non-FSS operations should indicate compliance with the less stringent antenna standard (item B9).

Item B10 If the earth station is operated from a remote location, give the location and telephone number of the control point.

Item B11-B12 If the earth station operates in frequency bands that are shared with other radio services, such as the C band (4/6 GHz), frequency coordination is required. In such cases, a Frequency Coordination Report and/or Coordination Contour map is required. Also see item B6, Frequency Coordination Limits. There are several private companies that will provide frequency coordination services for hire.

Item B13 The purpose of this item is to insure adherence to all regulations concerning the safety of air travel. See 47 CFR Part 17 for requirements concerning the notification and coordination of antenna structures with the FAA. Also see 47 CFR Part 25.113(c) concerning earth station filing requirements.

FCC 312
Main Form

Approved by OMB
6030-0080
Est. Avg. Burden Hours
Per Response: 11 Hrs.

FEDERAL COMMUNICATIONS COMMISSION
APPLICATION FOR SATELLITE SPACE AND EARTH STATION AUTHORIZATIONS

FCC Use Only
File Number:
Call Sign:
Fee Number:

APPLICANT INFORMATION

1. Legal Name of Applicant		2. Voice Telephone Number	
3. Other Name Used for Doing Business (if any)		4. Fax Telephone Number	
5. Mailing Street Address or P.O. Box		6. City	8. Zip Code
ATTENTION:		7. State / Country (if not U.S.A.)	10. Voice Telephone Number
9. Name of Contact Representative (if other than applicant)		12. Fax Telephone Number	
11. Firm or Company Name		14. City	16. Zip Code
13. Mailing Street Address or P.O. Box		15. State / Country (if not U.S.A.)	
ATTENTION:			

CLASSIFICATION OF FILING

17. Place an "X" in the box next to the classification that applies to this filing for each question a. and b. Mark only one box for 17a and only one box for 17b.

<input type="checkbox"/> a1. Earth Station	<input type="checkbox"/> b1. Application for License of New Station
<input type="checkbox"/> a2. Space Station	<input type="checkbox"/> b2. Transfer of Control of License or Registration
	<input type="checkbox"/> b3. Notification of Minor Modification
	<input type="checkbox"/> b4. Application for License of New Receive-Only Station
	<input type="checkbox"/> b5. Amendment to a Pending Application
	<input type="checkbox"/> b6. Application for License of New Receive-Only Station Using Non-U.S. Licensed Satellite
	<input type="checkbox"/> b7. Modification of License or Registration
	<input type="checkbox"/> b8. Letter of Intent to Use Non-U.S. Licensed Satellite to Provide Service in the United States
	<input type="checkbox"/> b9. Other (Please Specify):
	<input type="checkbox"/> b10. Other (Please Specify):

18. If this filing is in reference to an existing station, enter:
Call sign of station:

19. If this filing is an amendment to a pending application enter:
(a) Date pending application was filed: _____
(b) File number of pending application: _____

TYPE OF SERVICE

20. NATURE OF SERVICE: This filing is for an authorization to provide or use the following type(s) of service(s): Place an "X" in the box(es) next to all that apply.

a. Fixed Satellite c. Radiodetermination Satellite e. Direct to Home Fixed Satellite

b. Mobile Satellite d. Earth Exploration Satellite f. Digital Audio Radio Service g. Other (Please specify)

21. STATUS: Place an "X" in the box next to the applicable status. Mark only one box.

a. Common Carrier b. Non-Common Carrier

c. Using U.S. licensed satellites d. Using Non-U.S. licensed satellites

22. If earth station applicant, place an "X" in the box(es) next to all that apply.

a. Using U.S. licensed satellites b. Using Non-U.S. licensed satellites

23. If applicant is providing INTERNATIONAL COMMON CARRIER service, see instructions regarding Sec. 214 filings. Mark only one box. Are these facilities:

a. Connected to the Public Switched Network b. Not connected to the Public Switched Network

24. FREQUENCY BAND(S): Place an "X" in the box(es) next to all applicable frequency band(s).

a. C-Band (46 GHz) c. Other (Please specify)

b. Ku-Band (12/14 GHz)

TYPE OF STATION

25. CLASS OF STATION: Place an "X" in the box next to the class of station that applies. Mark only one box.

a. Fixed Earth Station b. Temporary-Fixed Earth Station c. 12/14 GHz VSAT Network d. Mobile Earth Station e. Space Station f. Other (Specify)

If space station applicant, go to Question 27.

26. TYPE OF EARTH STATION FACILITY: Mark only one box.

a. Transmit/Receive b. Transmit-Only c. Receive-Only

PURPOSE OF MODIFICATION OR AMENDMENT

27. The purpose of this proposed modification or amendment is to: Place an "X" in the box(es) next to all that apply.

<input type="checkbox"/>	a -- authorization to add new emergency designator and related service
<input type="checkbox"/>	b -- authorization to change emission designator and related service
<input type="checkbox"/>	c -- authorization to increase EIRP and EIRP density
<input type="checkbox"/>	d -- authorization to replace antenna
<input type="checkbox"/>	e -- authorization to add antenna
<input type="checkbox"/>	f -- authorization to relocate fixed station
<input type="checkbox"/>	g -- authorization to change assigned frequency(ies)
<input type="checkbox"/>	h -- authorization to add Points of Communication (satellites & countries)
<input type="checkbox"/>	i -- authorization to change Points of Communication (satellites & countries)
<input type="checkbox"/>	j -- authorization for facilities for which environmental assessment and radiation hazard reporting is required
<input type="checkbox"/>	k -- Other (Please Specify)

ENVIRONMENTAL POLICY

28. Would a Commission grant of any proposal in this application or amendment have a significant environmental impact as defined by 47 CFR 1.1307? If YES, submit the statement as required by Sections 1.1308 and 1.1311 of the Commission's rules, 47 C.F.R. §§ 1.1308 and 1.1311, as an exhibit to this application. A Radiation Hazard Study must accompany all applications as an exhibit for new transmitting facilities, major modifications, or major amendments. Refer to OET Bulletin 65.

YES NO

ALIEN OWNERSHIP

29. Is the applicant a foreign government or the representative of any foreign government?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
30. Is the applicant an alien or the representative of an alien?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
31. Is the applicant a corporation organized under the laws of any foreign government?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
32. Is the applicant a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
33. Is the applicant a corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
34. In any answer to questions 29, 30, 31, 32 and/or 33 is Yes, attach as an exhibit, the identification of the aliens or foreign entities, their nationality, their relationship to the applicant, and the percentage of stock they own or vote.		

BASIC QUALIFICATIONS

35. Does the applicant request any waivers or exemptions from any of the Commission's Rules? If Yes, attach as an exhibit, copies of the requests for waivers or exemptions with supporting documents.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
36. Has the applicant or any party to this application had any FCC station authorization or license revoked or had any application for an initial, modification or renewal of FCC station authorization, license, or construction permit denied by the Commission? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
37. Has the applicant, or any party to this application, or any party directly or indirectly controlling the applicant ever been convicted of a felony by any state or federal court? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
38. Has any court finally adjudged the applicant, or any person directly or indirectly controlling the applicant, guilty of unlawful monopolizing or attempting unlawfully to monopolize radio communications, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement or any other means or unfair methods of competition? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
39. Is the applicant, or any person directly or indirectly controlling the applicant, currently a party in any pending matter referred to in the preceding two items? If Yes, attach as an exhibit, an explanation of the circumstances.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
40. If the applicant is a corporation and is applying for a space station license, attach as an exhibit the names, addresses, and citizenship of those stockholders owning of record and/or voting 10 percent or more of the Filer's voting stock and the percentages so held. In the case of fiduciary control, indicate the beneficiary(ies) or class of beneficiaries. Also list the names and addresses of the officers and directors of the Filer.		
41. By checking Yes, the undersigned certifies, that neither the applicant nor any other party to the application is subject to a denial of Federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Act of 1988, 21 U.S.C. Section 862, because of a conviction for possession or distribution of a controlled substance. See 47 CFR 1.2002(b) for the meaning of "party to the application" for these purposes.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
42a. Does the applicant intend to use a non-U.S. licensed satellite to provide service in the United States? If yes, answer 42b and attach an exhibit providing the information specified in 47 C.F.R. § 25.137, as appropriate. If no, proceed to question 43.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
42b. What administration has licensed or is in the process of licensing the space station? If no license will be issued, what administration has coordinated or is in the process of coordinating the space station?		

FEDERAL COMMUNICATIONS COMMISSION

FCC 312 - Schedule A

(Place an "X" in one of the blocks below)

- CONSENT TO TRANSFER OF CONTROL** **CONSENT TO ASSIGNMENT OF LICENSE**
 NOTIFICATION OF TRANSFER OF CONTROL **NOTIFICATION OF ASSIGNMENT**
 OF RECEIVE ONLY REGISTRATION **OF RECEIVE ONLY REGISTRATION**

A1. Name of Licensee or Registrant		A2. Voice Telephone Number		FCC Use Only	
A3. Mailing Street Address or P.O. Box		A4. Fax Telephone Number			
ATTENTION: A5. City		A6. State / Country (if not U.S.A.)		A9. No. of station(s) listed	
A8. List Call Sign(s) of station(s) being assigned or transferred		A7. Zip			
A10. Name of Transferor/Assignor (if different than licensee or registrant)		A15. Name of Officer/Assignee			
A11. Mailing Street Address or P.O. Box		A16. Mailing Street Address or P.O. Box			
A12. City		A17. City		A19. Zip Code	
A13. State/Country		A14. Zip Code		A18. State/Country	
<p>A20. If these facilities are licensed, is the transferee/assignee directly or indirectly controlled by any other entity? If Yes, attach as an exhibit, a statement (including organizational diagrams where appropriate) which fully and completely identifies the nature and extent of control including: (1) the name, address, citizenship, and primary business of the controlling entity and any intermediate subsidiaries or parties; and (2) the names, addresses, citizenship, and the percentages of voting and equity stock of those stockholders holding 10 percent or more of the controlling corporation's voting stock.</p>					
<p>A21. If these facilities are licensed, attach as an exhibit, a complete statement setting forth the facts which show how the assignment or transfer will serve the public interest.</p>					
CERTIFICATION					
<p>1. The undersigned, individually and for licensee, certifies that all attached exhibits pertinent to Schedule A and all statements made in Schedule A of this application are true, complete and correct to the best of his/her knowledge and belief. The undersigned also certifies that any contracts or other instruments submitted herewith are complete and constitute the full agreement.</p>					
<p>2. The undersigned represents that stock will not be delivered and that control will not be transferred until the Commission's consent has been received, but that transfer of control or assignment of license will be completed within 60 days of Commission consent. The undersigned also acknowledges that the Commission must be notified by letter within 30 days of consummation.</p>					
A22. Printed Name of Licensee (Must agree with A1)		A23. Signature		A24. Title (Office Held by Person Signing)	
A26. Printed Name of Licensee Transferor/Assignor (If different than licensee, must agree with A1)		A27. Signature		A28. Title (Office Held by Person Signing)	
A30. Printed Name of Licensee Transferee/Assignee (Must agree with A1)		A31. Signature		A32. Title (Office Held by Person Signing)	
				A25. Date	
				A29. Date	
				A33. Date	

FEDERAL COMMUNICATIONS COMMISSION
 SATELLITE EARTH STATION AUTHORIZATIONS
 FCC Form 312 - Schedule B: (Technical and Operational Description)

If VSAT Network, provide the SITE-ID (Item B1b) of the station that B8-B13 are in response to (HUB, REMOTE1, etc.): _____

B8. If the proposed antenna(s) operate in the Fixed Satellite Service (FSS) with geostationary satellites, do(es) the proposed antenna(s) comply with the antenna gain patterns specified in Section 25.209(a) and (b) as demonstrated by the manufacturer's qualification measurements? If NO, provide as an exhibit, a technical analysis showing compliance with two-degree spacing policy. YES NO

B9. If the proposed antenna(s) do not operate in the Fixed Satellite Service (FSS), or if they operate in the Fixed Satellite Service (FSS) with non-geostationary satellites, do(es) the proposed antenna(s) comply with the antenna gain patterns specified in Section 25.209(a2) and (b) as demonstrated by the manufacturer's qualification measurements? YES NO

B10. Is the facility operated by remote control? If YES, provide the location and telephone number of the control point.

Remote Control Point Location:

B10a. Street Address	
B10b. City	B10c. County
B10d. State / Country	B10e. Zip Code
B10f. Telephone Number	B10g. Control Station (if appropriate)

B11. Is frequency coordination required? If YES, attach a frequency coordination report as an exhibit. YES NO

B12. Is coordination with another country required? If YES, attach the name of the country(ies) and plot of coordination contours as an exhibit. YES NO

B13. FAA Notification - (See 47 CFR Part 17 and 47 CFR Part 25.113(c))
 Where FAA notification is required, have you attached a copy of a completed FCC Form 854 and/or the FAA's study regarding the potential hazard of the structure to aviation?
FAILURE TO COMPLY WITH 47 CFR PARTS 17 AND 25 WILL RESULT IN THE RETURN OF THIS APPLICATION. YES NO

STATEMENT OF FCC CHAIRMAN WILLIAM E. KENNARD
November 25, 1997

Re: Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142

Re: Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111

Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, CC Docket No. 93-23

COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite, File NO. ISP-92-007

These items illustrate what I have stressed since my first day as Chairman as the principles that should guide the work of this agency, the three Cs: competition, community and common sense. They promote competition by opening up our telecommunications and satellite markets to foreign participation, ensuring that U.S. consumers will be confronted with an expanding array of choices and lower prices. They promote community by establishing a framework that should make it easier and cheaper for people around the world to communicate and exchange ideas. The items takes a common sense approach to opening our markets. They replace a process that has, to this point, been extremely burdensome administratively -- the process of authorizing foreign participation in our markets -- with a streamlined process that nonetheless gives us the ability to protect against the potential for anti-competitive harm where necessary.

Over the past two years, the United States has led a revolution in the telecommunications sector. On the domestic front, the Telecommunications Act of 1996 delivered a clear and compelling blueprint for competition in telecommunications services. Internationally, the

Commission acted decisively to reform the antiquated system for delivering international services. At the same time, the United States challenged the nations of the world to build a global communications network that brings the world together through communications and creates global opportunities. In February of this year, the United States reached a historic agreement with 68 other countries to open markets for basic telecommunications services around the world.

Today, the Commission considers rules governing foreign entry into the U.S. telecommunications and satellite markets in response to the landmark agreement on telecommunications negotiated under the auspices of the World Trade Organization (WTO). In that agreement, countries representing 90 percent of the \$600 billion global market for basic telecommunications services have pledged to open their markets to international competition. Equally as important, almost all the participants bound themselves to observe a set of pro-competitive regulatory principles that closely follow the Congressional vision of free competition, fair rules, and effective enforcement enacted in the Telecommunications Act. In light of the market opening and regulatory commitments contained in the WTO Basic Telecom Agreement, we expect to see a widespread shift away from the monopoly provision of telecommunications and satellite services and toward competition, open markets and transparent regulation.

The rules we consider today will open the U.S. telecommunications and satellite markets to foreign investment and entry by foreign carriers. Such entry will introduce new sources of competition in the telecom and satellite markets in the United States and attract much needed investment capital. Increased competition will benefit American consumers by producing lower prices, greater service choice and innovation. Our market-opening actions will also assist the U.S. telecommunications and satellite industries in their efforts to expand beyond our borders. As the world's leaders in telecommunications, our providers and manufacturers

are well-equipped to take advantage of the foreign market opportunities that will follow on the heels of the actions we take today. For example, the U.S. satellite industry holds 34 percent of the world satellite market. Finally, the rules we approve today make sense by establishing clear and understandable standards for entry, with streamlined procedures for most applicants and safeguards to prevent foreign carriers with market power from distorting competition in the U.S. market.

Our actions today once again put the United States in a leadership role of prompt and efficient implementation of U.S. commitments in the WTO Basic Telecom Agreement. We will be watching closely implementation by other countries. We expect that U.S. carriers will begin to enter and compete in previously closed foreign markets. We will know that the revolution we started is successful if, in a few years, most of the world's traffic is carried between countries where competition has replaced monopolies, prices decline for international phone calls, and those lower prices translate into a significant increase in the size of the world's international services market. I also expect to see a dramatic increase in the number of people who have access to a telephone around the world. Our own experience shows that competition takes some time to flourish. The WTO Basic Telecom Agreement is the beginning of the revolutionary journey to competition in many countries. With the adoption of the rules we are considering today, the U. S. will continue to spearhead that revolution.